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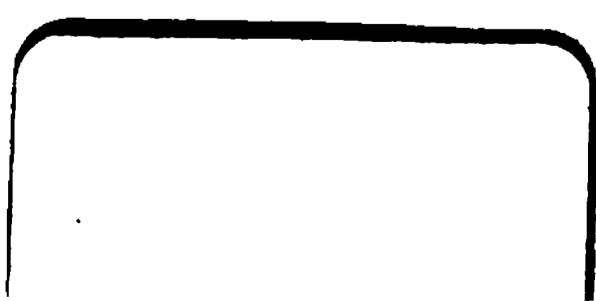
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A-1
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35

A
GENERAL INDEX

TO THE
MODERN REPORTERS,
RELATIVE TO
The Law occurring at Trials by Bill Prius,
FROM THE PERIOD OF
THE REVOLUTION
TO THE
PRESENT TIMES.

BY THE LATE JOHN KELLS, ESQ.

BARRISTER AT LAW.

VOL. I.

D U B L I N:

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A GENERAL

A G E N E R A L I N D E X, &c.

Actions in general.

1. **A**N action is the lawful demand of one's right—there are three kinds of actions, personal, real and mixed. Definition.
 Personal actions are such whereby a man claims a debt, or personal duty or damages, in lieu thereof; likewise whereby a man claims a satisfaction in damages, for some injury done to his person or property. The former are said to be founded on contracts, the latter on torts or wrongs.—Real actions are now generally laid aside in practice; formerly all disputes concerning real estates were decided by them.—A much more expeditious method of trying titles is now introduced by other actions, personal and mixed.—Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for the wrong sustained.

2. All civil injuries are of two kinds, the one without force or violence, as slander, or breach of contract; the other coupled with force and violence, as batteries, or false imprisonment. Injuries with force, and without force.

3. Actions *ex contractu*, are all such as are founded upon debt or promises; actions *ex delicto*, are those for trespasses, nuisances, assaults, defamatory words, and the like. Actions *ex contractu*, *ex delicto*.

3 *Blac. Com.* Page 116, 117

4. In local actions, where possession of the land is to be recovered, or damages for an actual trespass, &c. affecting the land, the venue must be in the very county; but in transitory actions, for injuries that might have happened any where, the plaintiff may declare in what county he pleads. Local—transitory.

294

Actions in general.

Salkeld.

Multiplicity
of.

5. Infinity or multiplicity of actions for the same cause are to be avoided.

Payne v. Partridge.

Page 12

Publick nuisance,

6. Therefore case lies not for a publick nuisance, except some particular damages accrue thereby. *Ibid.* 12. 16.

Particular injury.

7. And none can have an action without a particular injury, or particular right.

Iveson v- Moore.

16

Single act, several actions.

8. Yet a single act may be a ground for several actions, where divers are injured thereby.

Child v. Sands.

32

One act, divers offences.

9. Also a person may be twice sued for the same act, which may include divers offences.

Galizard v. Rigault.

552

Id.

10. As for an assault, indictment lies for breach of the peace, and action for damages to the party. *Ib.*

Id.

11. So for adultery, suit lies in the Spiritual Court, and action at common law, for battery of the wife. *Ib.*

Bringing action, actionable.

12. Bringing an action is not actionable, except some special collateral wrong be expressly shewn.

Savil v. Roberts.

14

Malicious prosecution.

13. But if one not concerned, procure A. to sue B. without cause, B. may have an action against him.
(See malicious prosecution.) *Ib.*

14. The plaintiff in one action, can't join his own right and another's.

Rogers v Cooke.

10

Divers rights.

15. *Indebitatus* to the testator, and *insimul computasset* to the administrator, are not joinable. *Ib.*

Contract, tort.

16. A contract and a tort, can't be joined in the same action. *Ib.*

Id.

Therefore *assumpsit* on the custom of the realm, and trover can't be joined against a carrier. *Ib.*

17. Where

Actions in general.

3

Salkeld.

17. Where two joint merchants make B. their Partner. factor, and one dies, leaving an executor, the executor and survivor can't join in an action.

Martin v. Crump. Page 444

18. Divers members of a corporation, &c. can't join in a *mandamus* to be restored. Members of corporation.

Case of Andover. 433

19. A tenant for years erects a nuisance, and makes an under-lease to B. plaintiff may have an action against either. Nuisances.

Rosewell v. Prior. 460

20. But one may have a new action for continuing the same nuisance, for every new dropping, &c. is a nuisance. Continuing nuisance.

Johnson v. Long. 10

21. Said that a matter *expost* may defeat an action, so it may give a new one. (*Sed quere.*) Matter *expost.*

Fetter v. Beale. 11

22. For after recovery in assault and battery, tho' it prove a mayhem in consequence, one can't have battery and mayhem. Id. *Ib.*

23. Yet a matter *expost* may abate an action, as where one beats my servant and he dies. Id. *Ib.*

24. For in that case *actio moritur cum persona.* *Actio moritur.*
Zouch v. Thompson. 210

25. But where a tort is to a man's property or possession, *Actio non moritur, &c.* *Actio non moritur.*
Ib. 210, 314

26. Where a statute gives a right, the common law gives an action to recover it. Right by statute.

Ewer v. Jones. 415

27. Where two joint merchants are, and one dies, the action survives to the other, but not the duty or interest. Partner, action survives not interest.

Martin v. Crump. 444

A 2

28. Where

Actions in general.

Salkeld.

Release of
right, several
remedies.

28. Where one releases his right, he can't pursue his action or remedy; but if he has a right and several remedies, the discharge of one does not discharge the other.

Hunt v. Burn. Page 422

1 *Blackstone.*

Trifling.

29. Trifling actions are discharged by the court.

Anon. 207

Satisfaction.

30. Satisfaction made to the plaintiff in actions on the case pending the suit, will take away the remedy.

Bird v. Randel. 388

2 *Blackstone.*

Personal ac-
tion not going
on to judgment.

One personal action not going on to judgment, is no bar to another for the same cause of action;—but if judgment is had on the merits, then it bars all personal suits for the same cause of action.

Hitchin v. Campbell. 830

Cowper.

*Moritur cum
persona.*

Actio personalis moritur cum persona, is a maxim not generally, much less universally true.

Hambly v. Trott. 371

Penal action,
criminal pro-
ceeding.

Distinction between penal actions and criminal proceedings.

Atcheson v. Everitt. 391

Penal actions are never classed under the head of criminal law;—a quaker's affirmation in such, admissible. *Ib.*

Transitory.

All actions of transitory nature that arise abroad, may be laid as happening in an *English* county.

Moslyn v. Fabrigas. 177

Admiralty.

Admiralty.

Douglas.

1. **T**HE sentence of a foreign court of admiralty is conclusive against all the world in all civil suits, as to all matters within its jurisdiction, and decided by the sentence. Sentence of foreign court.

Bernardi v. Motteux. Page 559

2. The jurisdiction over all matters of prize, and every thing consequential to a capture as prize, belongs exclusively to the court of admiralty. Jurisdiction how far extends.

572 to 591. 591 to 597
Le Caux v. Eden. (In note.)

3 *Durnford and East.*

3. Whether the Admiralty have, or have not jurisdiction, depends upon the subject matter. Id.

Menetone v. Gibbons. E. 29 Geo. 3. 267

4. The Admiralty court has jurisdiction over the question of freight, claimed by a neutral master against the captor, who has taken the goods as prize. Id.

Smart v. Wolfe. T. 29 Geo. 3. 323

5. The court of Admiralty has exclusive jurisdiction over questions of prize, and their consequences, Id.

Ib. 344

Hen. Bl.

6. The Admiralty have no jurisdiction in a case where a vessel is injured in the Thames, within the body of a county. Id.

Velthafen v. Ormsby. T. 29 Geo. 3. 315

Agent.

Agent.

- To a regi-
ment.
1. Lord *Raymond*.
A G E N T of a regiment is but servant to the colonel, and the receipt of the agent charges the colonel; there is no privity between the King or the soldier, and the agent—*per Holt*.
Beaumont v. Pine. Page 101
- Act affirmed
in part. v
- Strange*,
 2. An act of an agent cannot be affirmed as to part, and avoided as to the rest.
Wilson v. Poulter. 859
- Charged as
bailiff or wrong
doer.
3. A man sells goods, or lays out money wrongfully, the owner may charge him as bailiff, or as a wrong doer at his election.
Ib. 860

The wife of A. a bankrupt, brought to the defendant a sum of money belonging to the bankrupt, and desired the defendant to purchase *India* bonds. The defendant knowing of the bankruptcy, purchased thirty bonds, and delivered them to the bankrupt's wife, the plaintiff as assignee seized twenty-two of them, as part of the bankrupt's estate, and brought *trover* for the value of the remaining eight; the court were of opinion, that the seizing part of the bonds was an affirmation of the defendant's act, in laying out the money.—Defendant had judgment.

Ib.

- Action against
principal.
4. *Burrow*.
 4. An action for money had and received, will not lie against a known agent or receiver, for money paid *voluntarily* to such agent for the use of the principal, unless he had paid it over after notice not to do it—*per Baron Perrot*.—It would be absurd to make the collector or receiver of another person liable to an action for every payment *voluntarily* made to him; and to leave him to be defended or deserted as his principal should think fit.
Sadler v. Evans 1985

2 *Ld. Ray.* 1210, *Pond v. Underwood*—approved.
Jacob v. Allen, 1 *Salk.* 27.—denied.

5. Action

Cowper.

5. Action for money had and received, to recover a sum of money paid defendant, as due upon a policy of insurance as agent for the insured plaintiff, thinking the loss fair. *Per Cur.* If money be mispaid to an agent expressly for the use of his principal, and he has paid it over, he is not liable in an action by the person who mispaid it, but that person has his remedy over against the principal.

Money mis-
paid.

Buller v. Harrison. Page 566

6. But if before he has paid the money to his principal, the person corrects the mistake, the agent cannot afterwards pay it over without making himself liable. *Ib.* *Ib.*

Mistake cor-
rected before
paid, &c.

7. And if there was no new credit, no acceptance of new bills, no fresh goods bought, or money advanced for his principal, the merely passing it in account, is not a payment over. *Ib.* 568

Passing in ac-
count.

8. Where a man pays money by his agent, which ought not to have been paid, either the agent or principal may bring an action to recover it back.

Money mis-
paid, how re-
covered.

Stevenson v. Mortimer. 805

9. If money is mispaid to a *known* agent, and an action brought against him for it, it is an answer to such action, that he has paid it over to his principal. *Ib.* *Ib.*

Paid over to
principal.

Concerning the duty of an agent in insuring, and what is, or is not negligence in him.

Negligence.

Vide Moore v. Mourgue. 479

To maintain an action against an agent for misbehaviour, he must be guilty either of a breach of orders, gross negligence or fraud.

Moore v. Mourgue.—Cowp. 479, 480

Douglas.

10. An agent's bill to an attorney in the country, may be taxed by the master.

Agent's bill,
attorney.

(In note.) *Dixon v. Plant.* 189, 200

11. Payment to the agent employed to sue the defendant, by the plaintiff's attorney, is not payment to the plaintiff, tho' payment to the attorney himself is.

Payment to
agent for at-
torney.

Yates v. Freckleton. 600, 623

12. An

Contracts for
government.

1 *Durnford and East.*

12. An officer appointed by government treating as an agent for the public, is not liable to be sued upon contracts made by him in that capacity.

Macbeath v. Haldimand. Page 172

Do.

Per Lord Mansfield. Great difference has arisen since the revolution, as to the expenditure of the public money; before that period, all the public supplies were given to the King, who in his individual capacity, contracted for all expences; he alone had the disposition of the public money; but since that time the supplies have been appropriated by Parliament to particular purposes, and now whoever advances money for the public service, trusts to the faith of Parliament—It was notorious in this case, that the defendant did not personally contract, the plaintiff knew at the time that he furnished the stores, that they were for the use of government, and he afterwards made government debtor in his bills.

Ib. 176

Do.

13. He is not liable personally, even though he contract by deed, if it be *on account of government.*

Unwin v. Wolesey. 674

Agent of at-
torney.

14. A plaintiff is bound by the acts of his attorney's agent in town.

Griffiths v. Williams. 710

Fines for re-
newals.

15. Under a bond of indemnity given by A. that B. who was appointed general agent of C. the receiver of his rents, and the manager of his estates, should pay over to C. all rents which he should receive; *as also the increase and improvements thereof, upon any new contracts or renewals or leases*, A. is answerable for all fines received by B. on renewing the leases, which were not paid over by him.

The Irish Society v. Needham. 482

Delivery of
goods to.

3 *Durnford and East.*

16. Where an agent is employed to buy goods, an acknowledgment under his hand writing, of his having received them, is evidence of a delivery to the buyer.

Biggs v. Laurence.—*M.* 30 *Geo.* 3. 454

17. A special agent under a limited authority, cannot bind his principal by any act beyond the scope of such authority.

Fenn v. Harrison.—*T.* 30 *Geo.* 3. 757

3 *Durnford and East.*

In this case, the holder of a bill of exchange desired A. to get it discounted, but positively refused to indorse it, and A. delivered it to B. for the same purpose, informing him to whom it belonged, and B. finding that he could not dispose of it without indorsing it, was prevailed upon to do so by A's. telling him that he would indemnify him, but the indorsee took it upon the credit of the names on the bill without any knowledge of the real owner, altho' such original holder afterwards promised to pay the bill, yet such promise cannot support an action brought against him by the indorsees, it being *nudum pactum*, for as A. was a special agent under a limited authority, he could not bind his principal beyond the scope of such limited authority.

Fenn v. Harrison.—Tr. 30 Geo. 3. Page 757

18. *Per Ashburst* justice. A general agent shall bind his principal by all his acts, as if a stable-keeper having an horse to sell, directs his servant not to warrant him, which he nevertheless does, the master will be liable on the warranty, because the servant was acting within the general scope of his authority; and the publick cannot be supposed to be cognizant of any private conversation between the master and the servant, but if the owner of the horse were to send a stranger to a fair, with express direction not to warrant the horse, and the latter acted contrary to orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment, and that is like the present case.

General agent, authority.

Id.

4 *Durnford and East.*

19. Fraud will vitiate any transaction, though the principal interested do not personally take any part in the fraud, for the principal is civilly responsible for the acts of the agent.

Fraud vitiates tho' principal ignorant.

Doe d. Willis v. Martin.—Mich. 31 Geo. 3. 39

20. If the agent, employed by the indorsees of a bill to get it discounted, warrant it to be a good one, his employers are bound by his act, and are liable to refund, if the bill be afterwards dishonoured by the acceptor.

Principal bound by warranty of bill.

Fenn v. Harrison.—Hil. 31 Geo. 3. 177

21. *Secus.*

Agent.

4 *Durnford and East.*

21. *Secus.* If at the time of employing the agent, the principals said, they would not warrant or indorse the bill.

Fenn v. Harrison.—*Hil. 32 Geo. 3.* Page 177

Espinasse. Cases at N. P.

General, particular.

22. Where a man appoints a general agent, he is bound by all his acts—*aliter*, where he appoints an agent for a particular purpose only, there the principal is only bound to the extent of the authority given.

East India Company v. Hensley. 111

Annuity.

Annuity.

5 *Durnford and East.*

1. **E**VERY deed, &c. by which an annuity is secured, and which is not properly registered, is void, not merely voidable, and a creditor of grantor may take advantage of it.

Saunders v. Hardinge. Page 9

2. Where 1200l. had been paid for the grant of an annuity, and the securities to prevent their being registered had been renewed from 20 days to 20 days, and then 600l. had been paid for the grant of a further annuity, and the securities renewed in like manner, and sometimes after a longer period than 20 days, and afterwards had been registered; a memorial of the annuity stating the consideration to be 1800l. was deemed valid.

Simmons v. Mortimer.—H. 33 G. 3. 139

3. So where the consideration of an annuity was stated in the memorial to be 640l. 105l. of which was paid in money by the grantee to the grantor at the time, and the remaining 335l. was paid by the grantee at the desire of the grantors to another person, to redeem a former annuity granted by them, for which only 480l. was paid, this was held a sufficient consideration within the act.

Ex parte Fallon and wife.—T. 33 G. 3. 283

4. The first section of the annuity act, requiring the deeds to be enrolled within 20 days of the execution, &c. means 20 days, exclusive of the day of execution. *Ib.*

5. If it be set forth in the memorial of an annuity registered, under 17 G. 3. c. 26. that the consideration was so much in money paid, when the real consideration was part in money, and the giving up of a former annuity, the court will set aside the securities.

Washburn v. Birch.—M. 34 G. 3. 473

6. So if part of the consideration be paid over by the grantee to a third person with the consent of the grantor, or is accounted for to the grantor by a note from a third person, and it is stated in the memorial, that the whole consideration was paid in money, the court will set aside the annuity deeds.

Watts v. Millard.—E. 34 G. 3. 598

7. The

5 *Durnford and East.*

7. The memorial of an annuity deed, stated it to have been executed on the trusts therein mentioned, and on further trust, that if any of the payments should be in arrear 20 days after becoming due, the grantee might levy them out of the rents, the grantor moved to set aside the annuity, because the memorial did not disclose the trusts referred to, but it appearing by an affidavit of the grantee that he bought the annuity for himself, and that there were no other trusts but that expressed, the court held the memorial to be sufficient.

Tolderoy v. Allan—H. 34 G. 3. Page 480

8. The legislature only meant to require the parties to set forth the trusts created for, or in consequence of the annuity, not those which are a lien on the estate, independantly of the annuity, as those to pay taxes, &c. 481

9. A solicitor who advances his own money on the purchase of an annuity, is not intitled to any commission fee, and if any part of the consideration money be returned to him by the grantor as a change for such commission, the court will set aside the annuity deeds.

Broomhead v. Eyre.—E. 34 G. 3. 597

10. If several deeds be executed to secure one annuity, and the christian name of the witness to one of the deeds be omitted in the memorial, the court will not set aside the deeds.

Watts v. Millard.—E. 34 G. 3. 598

11. It is no objection to one of the deeds securing an annuity, that it assigns the salary of the grantor of so much *per annum*, without saying what salary it is. *Ib.*

12. An annuity granted by A. to B. and which was regularly registered, was redeemed by virtue of a clause of redemption in the deeds; when the deeds were delivered up to the grantor uncanceled, and he and the attorney for the grantee agreed, that if at any future time the former should wish to borrow money on the same terms, those deeds should be given as a security on a subsequent application by the grantor, the attorney advanced the same money on having the same deeds delivered to him, but because this re-grant of the annuity was not registered, the court set aside the annuity, and ordered the deeds to be cancelled, &c.

Hammond v. Foster.—E. 34 G. 3. 635

13. An

5 *Darnford and East.*

13. An annuity granted in consideration of the grantee resigning his situation as master of an academy in favour of the grantor, need not be registered under the annuity act, even though at the time of the grant, the grantee agreed to assign over to the grantor his household furniture, &c. at an appraised value, and to lend a sum of money to the grantor, to be re-paid with interest.

Hutton v. Lewis.—T. 34 G. 3. Page 639

14. If the memorial of a deed to secure an annuity be defective, the whole deed is void to all intents, even though there are other parts of it not connected with the annuity.

Denn d. Dolman v. Dolman.—T. 34 G. 3. 641

15. An annuity deed set aside for two defects in the memorial, first, because the memorial only stated that part of the consideration was paid by the grantee to the trustee, in trust, and for the purposes therein mentioned, without disclosing those trusts; secondly, because the memorial only set forth, that the demise was made by the grantor to a trustee, upon the trusts therein mentioned, without saying what the trusts were. *Ib.*

16. A bond given by a third person, to secure the payment of an annuity, must be registered under the annuity act, as well as the deeds made by the grantor himself.

Rosher v. Hurdis.—T. 34 G. 3. 678

Apprentice.

Apprentice.

Apprentice
how bound.

Salkeld.

1. **A**N apprentice cannot be bound or discharged without deed.

Inhabitants of Caster. Page 68

Not assign-
able.

2. He is not assignable over, (except by the custom of *London*, to one of the same trade.)

The King v. Peck. 66, 68

Executor
when bound
to instruct.

3. Nor is the master's executor bound to provide for an apprentice in husbandry, on 5 *El.* *Ib.* 66

Id.

4. Yet the executor is liable in covenant, if he does not instruct an apprentice, to find him another master.

Ib. 66. 68

Gains of ap-
prentice.

5. Whatever the apprentice gains belongs to the master, and he may have an action for it.

Barber v. Dennis. 68

Douglas.

Not assign-
able.

6. An apprentice is not assignable, nor transmissible to personal representatives; yet if he continue with consent of all parties and his own, it is a continuance of the apprenticeship.

The King v. Stockland. 70

Arrest.

Arrest.

Holt.

1. **A** R R E S T after the writ is returnable is illegal. After return of writ.

Anonymous. Page 70

Salkeld.

2. Arrest on *Sunday* is void, and the party may have false imprisonment. On Sunday.

Wilson v. Tucker. 78

3. No arrest can be without actually touching the body. Touching the body.

Genner v. Sparks. 79

The party in this case presented a fork, and prevented the bailiff approaching. *Ib.*

4. But if the bailiff be prevented from touching by the parties offering to strike him with a weapon, 'tis an assault. Bailiff prevented.

Ib.

5. And if the bailiff once touch him in the arrest, he may pursue and break open the house to take him. Bailiff once touches.

Ib.

6. Or he may have an attachment, or return a rescue against him. Id.

Ib.

(If the person submits to go with the bailiff it is an arrest, though not touched.—*Buller's N. P.* 62.) 62

7. Where there are two sheriffs, the arrest or neglect of one, is the arrest or neglect of both. Two sheriffs.

The Queen v. Warrington. 152

1 Lord *Raymond.*

8. Arrest on a warrant of a justice of peace, directed to a man, not an officer, lawful. By a person, not an officer.

The King v. Kendal. 66

9. Where there is an ill warrant upon a good writ, and the sheriff is privy to the arrest, the party is lawfully in his custody, and he may justify by the writ. Bad warrant, good writ.

The King v. Fowler. 586

10. A joint

One plaintiff
alone arrests.

1 Lord *Raymond*.

10. A joint plaintiff procures the defendant to be arrested without the consent of the other, this is no offence.

Savill v. Roberts. Page 380

2 Lord *Raymond*.

Constable,
affray over.

11. A constable cannot arrest after the affray is over.

The Queen v. Tooley. 1301

Soldier.

12. An action lies for arresting a soldier against the mutiny act; and the sheriff may return, that the defendant is enlisted.

Sheriff of Middlesex's case. 1246

Imprison-
ment includes
arrest.

13. Pleading to an imprisonment includes an arrest, and omitting the naming an arrest, makes no discontinuance.

Blackmore v. Tidderley. 1100

Per Holt.—Imprisonment cannot be without an arrest, nor an arrest without imprisonment; for an arrest is an actual imprisonment. *Ib.*

Strange.

Justify bat-
tery.

14. Arrest will not justify a battery without resistance, or an attempt to rescue himself, tho' it will an assault.

Williams v. Jones. 1049

Hardwicke.

Arrest with-
out touching.

15. If a bailiff comes into a room, and locks the door on a person, and tells him he arrests him, it is an arrest, tho' he does not lay hands on him.

Williams v. Jones. 286

Battery not
justified by.

16. A battery cannot be justified by an arrest by legal process, but it should be pleaded, that the defendant laid his hands softly on him, in order to arrest him, and the defendant made resistance in order to rescue himself, and by reason of that he beat him. *Ib.*

Battery *mollis-*
ter manus.

17. A battery may be justified by a *molliter manus imposita*, because the plaintiff would not go out of the defendant's house when he desired him, averring, that it is the same battery.

Tottedge v. Petty. 343

Implies an
assault.

18. An arrest implies an assault.

Williams v. Jones.

19. A ser-

Arrest.

17

1st *Wilson*.

19. A serjeant in the guards cannot be arrested under 10l. Soldier.

Goodall's Case. 1 *Wils*.

Page 216

2 *Wils*.

20. A member of Parliament is privileged from arrests in all cases, except treason, felony, and breach of the peace. Member of Parliament.

The King v. Wilkes.

159

1 *Bl*.

21. A defendant illegally arrested, and in custody at the suit of one plaintiff, is not privileged from arrest at the suit of another, unless there be some collusion. Of party illegally in custody. *Bl*. 823

Howson v. Walker.

Crowden v. Walker.

Cooper.

22. A bailiff in execution of *mesne process*, may break open the door of a lodger's apartment, having first gained peaceable entrance at the outer door of the house. Lodger's apartment.

Lee v. Gansel

1

The entrance of the officer was peaceable at the outer door.—General Gansel had rented an apartment for 28 years—the officer forced his thigh in at the door, and got into the apartment.

23. Whether the court will discharge a person illegally arrested is a matter of *discretion*, and seems to depend on the behaviour of the party applying. Discharge, illegal arrest. *Ib*. 9

24. An arrest must be by *authority* of the bailiff, but he need not be the *hand* that arrests, nor *in sight*, nor *within any precise distance* of the defendant, but he must be employed upon that business. Bailiff not in sight.

Blatch v. Archer.

65

In debt for an escape against the sheriff, a legal arrest must be proved. *Ib*.

25. The bailiff's name indorsed on the writ is sufficient evidence, that he was *authorized* by the sheriff to arrest without proving the warrant. *Ib*.

Douglas.

26. An action will not lie against a *peace officer*, for arresting a person *bona fide*, on a charge of felony without a warrant. Peace officer, without warrant.

VOL. I.

B

warrant,

warrant, although it turn out, that no felony was committed, but a private person is liable.

Samuel v. Payne.

Page 345 to 346

Privileged
persons.

27. An action does not lie against a sheriff or his officer, for having arrested a certificated bankrupt, a discharged insolvent debtor, a peer, a party to a cause, or a witness, *tund. et rediendo.*

Tarlton v. Fisher. 646

Id.

28. *Per Ashurst J.* — A sheriff is bound to execute process issuing out of a court of competent jurisdiction, and tho' there be no cause of action, or the process be erroneous, he is not responsible. — It is a plaintiff's business to take care how he takes out his writ, if he deliver it to the sheriff, he takes all upon himself. *Ib.*

Arrest out of
county.

29. If a party is arrested by bill of *Middlesex* out of that county, the proceedings will be set aside for irregularity.

Devenege v. Dalby. 369

1 *Durnford and East.*

Constructive
breach of peace,
Sunday.

30. One who is convicted of a penalty under the lottery act, cannot be apprehended on a *Sunday* for non-payment of the forfeiture, it not being a constructive breach of the peace, tho' the defendant might have been indicted in a criminal manner on the act, in which case he might have been arrested on a *Sunday*.

The King v. Myers. 265

Id.

31. So an attachment for non-performance of an award, is only in the nature of a civil execution. *Ib.* 266

32. So an attachment for non-payment of costs. *Ib.*

Feme covert.

33. A *feme covert* was discharged out of custody, because she was arrested without her husband, though the writ was sued out against both, on which *non est invenius* was returned as to the husband.

Edwards v. Rourke. 486

By captain of
ship.

34. The defendant was captain of the *Trident* man of war, and put the plaintiff, who was the purser into confinement, he kept him there for three days, after which he liberated him without any charge or court-martial. Plaintiff recovered for the imprisonment.

Swinton v. Molloy. (cited) 537

35. The

2 Darnford and East.

35. The officer may permit the person arrested to go at large, provided he has him at the return of the writ, but in the case of final process, he cannot for a minute.—*Per Ashurst J.*

Atkinson v. Matteson.

Page 172

36. The court will not discharge a defendant out of custody on filing common bail, on the ground that he has become insane. Defendant become insane.

Kerrot v. Norman. 390

37. The 63d clause in the mutiny act, which exempts soldiers from arrests in certain cases is confined to civil suits. Soldiers.

The King v. Archer. 273

3 Darnford and East.

38. A person within the walls of a prison, though voluntary, cannot be arrested by a creditor in the ordinary manner, but a detainer must be lodged against him. Person in prison, detainer.

Wilkinson v. Jacques. 392

39. If a party be arrested maliciously, and without any cause of action, his remedy is by an action for maliciously holding him to bail. Malicious arrest.

Belk v. Broadbent. 183

4 Darnford and East.

40. The court will not discharge a person in custody by process of the sheriff's court, in a cause afterwards removed into K. B. because he was arrested while attending commissioners of bankrupt to prove a debt. Person attending Commissioners.

Kinder v. Williams. 377

41. The court will not discharge a person out of custody on filing common bail, on the ground that he was insane at time of the arrest. Person insane.

Nutt v. Verney. 121

Hen. Blackstone.

42. All persons who have relation to a cause, which calls for their attendance in court, whether they are compelled to attend by process, or not, are entitled to privilege from arrest, *cundo et reduendo*, provided they come *bona fide*. Persons concerned in a cause.

Meekins v. Smith. 636

Hen. Blackstone.

Bail.

43. In which description bail are included.

Meekins v. Smith. Page 636

Barristers.

44. And barristers on circuit.

*Ib.**Espinasse.* Cases at N. P.

Outer door.

45. What shall be deemed an outer door, which it is not lawful to break, for the purpose of an arrest—in the case the plaintiff's house stood in a stable yard, there was a hatch gate at the foot of the stairs, which led to an open gallery, from whence there were doors to the several apartments—a door at the top of the stairs considered as an outer door of plaintiff's apartment.

Hopkins v. Nightingale 99

Arrest.

Affets.

Holt.

1. **A** Reversion, expectant upon the determination of an estate for life, is *quasi* affets, and ought to be pleaded specially by the heir.

Kellow v. Rowden. Page 72

2. All separate debts mentioned in the inventory, shall be affets in the hands of the executor, until demand and refusal be proved.

Debts affets
till when.

Shelley's Case. 306

3. Where a reversion in fee, fallen into possession, is affets fallen into the hands of the heir.

Reversion, af-
fets.

Kellow v. Rowden. 337

1 Lord *Ray.*

4. Reversion on an estate for life, is affets by descent.

Reversion in
fee, affets.

Rook v. Clealand. 53

5. The heir takes by descent, lands devised to him charged with incumbrances, where the devise makes no alteration in the limitations,

Emerson v. Incbbird. 728

2 *Ld. Ray.*

6. The heir ought not to plead a lease for years, made by his ancestor in delay of execution,

Smith v. Angell. 784

7. *Extendi facias*, where an estate for life is pleaded by the heir.

Ib. 785

8. Where the heir is falsified in his confession of affets, general judgment shall be given against him.

Ib. 786

9. Plea of payment of another bond by the heir without notice, ill.

Burland v. Tyler. 1391

1 & 2 *Wilf.*

10. Affets marshalled, so as to let in a legacy, charged upon the real and personal estate, to which a condition to marry with consent annexed.

Rbenish v. Martin. 132

11. A

Reversion af-
ter 500 years.

1 & 2 *Wilf.*

11. A reversion after a term of five hundred years, is immediate assets in the hands of the heirs by descent.

Villers v. Handley. Page 49. b.

Reversion ex-
pectant.

2 *Black.*

12. Where an obligor is seized of a reversion in fee, expectant on several estates tail, this reversion coming into possession in the hands of his heir is then assets by descent, to charge him with the debt.

Smith v. Parker.

1230

Ver. & S.

13. Where an executor pleads a judgment outstanding, and the plaintiff replies assets, *ultra* upon the issue thereon, the defendant may cover assets to the amount of the judgments, though it be for the penalty of a bond, conditioned for the payment of a less sum.

88

14. *Non assumpsit* singly pleaded by an executor, is an admission of assets.

230

Stignee.

Assignee.

Holt.

1. **C**OVENANT was brought against assignee of a term for years, for rent incurred after his assignment over to another, without notice to the lessor; assignee of a term, is only chargeable in respect of the estate, and is not bound to give notice of assignment over.

Notice of assignment over.

Pitcher v. Tovey. Page 73

2. Assignment by assignee discharges him, because he was only chargeable as having the land, and there is no more reason for his giving notice to the lessor of his assignment over, than of the assignment to him by the lessee.

Assignment by assignee.

Richards v. Turvy. 73

3. Privity of contract remains against an assignee, after the privity of estate is gone.

Midgley v. Lovelace. 74

4. (Assignee is not bound unless named, if the covenant be annexed to a thing not *in esse*—as if B, lessee covenants for himself and his executors to build a wall—otherwise for himself and his assigns. 5 Co. 15.—if the thing to be done, be merely collateral, it shall not bind the assignee, though named; as to build a house upon other land of the lessor, or to pay a collateral sum of money. *Ib.* 15)

5. (In an action by an assignee, the plaintiff must shew how assignee—if he sues for rent upon a lease by another, he must shew a legal estate or title to it—but if he shews an assignment, it is sufficient, though he does not name himself assignee.—5 Com. D. 215.)

6. Lessee for years pleads to an action of covenant for non-payment of rent, that he had assigned the term before the grant of the reversion to the plaintiff.—*Per Holt*, the plea ought to have set forth, that the plaintiff had accepted rent from the assignee, or that he had notice of the assignment, but still the plaintiff should have had judgment, because, being grantee of the reversion, he may maintain this action

Assignment before grant of the reversion.

Express co-
vtenant.

action against the lessee, even after the assignment of the lease, and though he had then accepted the rent, and this he might do on the lessee's express covenant to pay it which runs with the land,

Parker v. Webb. Page 75

Enjoyment.

Holt,

7. Administrator of lessee, is chargeable as assignee in debt for rent, for the time he enjoys, and is in possession of the premises,

Buck v. Barnard, 75

Covenant by.

Salkeld,

8. Where the lessor himself can't maintain covenant, &c. his assignee shall not, for the matter is transferred to him, in the same plight that lessor had it.

Barker v. Damer. 81

Covenant
laws in Ireland
payable in Eng-
land.

9. *Ergo*, the assignee of a covenant can't sue in *England* for rent, reserved on lands in *Ireland*, though payable in *London*,

Ib. 80, 81

Notice,
arrear after
assumpsit.

10. Lessee assigns to A. A. assigns to B. without notice to the lessor, yet lessor can't have covenant against A. for arrears incurred after the assignment of A. for there is neither privity of estate, nor of contract, between the plaintiff and defendant,

Pitcher v. Tovey. 81

(See *Holt* 73.)

11. And *Kighly's* case in 1 *Sld.* 338. *Raym.* 162. 2 *Ib.* *Keb.* 260. denied.

Before as-
signment.

12. But he may have covenant against A, for rent, due before assignment. *Ib.*

13. The assignment may be to a beggar, and it is the lessor's own fault and folly to take the first assignee for his tenant, but the lessor is not without remedy, he may bring covenant against the lessee's executors, or distrain the land. *Ib.*

14. (V. 1 *Lev.* 215. 2 *Vent.* 228. *Carth.* 1 *Vern.* 165. 1. *Eq. Abr.* 47.)

15. (14)

15. (In all cases whether the action is brought by the lessor, his heirs or executor against the assignee of the lessee, the plaintiff need not set forth the mesne assignments of the term to the defendant, because they do not lie within his knowledge; it is sufficient for the plaintiff to set forth the demise to the first lessee, whose estate and interest in the premises the defendant has by assignment, and was thereof possessed, &c.
Gilbert on debt. Page 411

Mesne assignment.

15. (6) In debt for rent against the devisee of the lessee, the plaintiff must shew an entry by assent of the executor, or *virtute legationis*. 5 Com, D. 215.)

1 Raym.

16. Assignment of a term may be pleaded, without notice to the lessor,

Notice.

Cook v. Harris. 368

17. *Per Holt.*—The assignee has the estate in him before entry, though not to bring trespass,

Assignee, estate before entry.

18. Assignment of a bond, though it is not assignable in point of interest it is a covenant that the assignee shall receive it.

Parishes of Caister & Eccles. 683

Strange.

19. If lessee reserves the rent to himself, on granting over it is an under-lease, and not an assignment, though he parts with the whole term.—*Per Cur.* the reservation was to the lessee, and not to the original lessor, and the lessee might maintain debt for rent upon it, though he could not distrain for want of a reversion.

Under lease not assignment, though of whole term.

Poultney v. Holmes. 405

20. (Debt lies for rent arrear, by the assignor of the whole term, though he has no reversion.

Debt by assignor of whole term.

Newcombe v. Harvey. *Carth.* 161

3 *Wilson.*

21. An assignee of a lease assigned to him by an administrator, is not obliged to make a *proferat in curiam* of the letters of administration. *Per Lord Chief Justice.*

Assignee, letters of administration.

Rawlinson v. Stone. 3

22. Lessee of tythes covenants for him and his assigns, that he will not let any of the farmers in the parish have any part of the tythes, this covenant runs with the tythes and binds

Covenant binding assignee.

binds the assignee, against whom this action is brought for breach of covenant.

Bally v. Wells. Page 25

(When covenant runs with the land: *V. 5 Rep. 16. n. Spencer's case.*)

3 *Wilson.*

Bail bond.

The assignee of a bail-bond must bring his action thereon in the same court, where the original action was commenced; for that court only seems to have jurisdiction of the action.

Morris v. Rees. 348

2 *Blackstone.*

Half-pay.

22. Though an officer's half-pay is not assignable at law, yet the use of it may be assigned in equity, and when so assigned, the assignor cannot maintain *assumpsit* for it as money had and received to his use.

Stuart v. Tucker. 1137

5 *Burrow.*

Of a term without stamp.

23. Assignment of a term may be by a *note in writing* (an indorsement on a lease) without either *seal, delivery or stamp.*

Beck v. Philips. 2832

Douglas.

Assignees in law.

24. An assignee of a *bankrupt, a devisee and a personal representative* are assignees in law, to the purpose of being liable to actions on a *covenant for rent in a lease* to the bankrupt's *devisor or intestate.*

Holford v. Hatch. 176

(*Arguendo.*)

25. *Qu.* If the transfer to them is an assignment, which will occasion a *forfeiture* under a proviso not to assign.

176 & n.

Assignment to *feme covert.*

26. A lease may be assigned to a *feme covert* and is good, unless the *husband* disagree.

Barnfather v. Jordan. 435

Mortgagee, assignee not in possession.

27. If a term is assigned by way of *mortgage* with a clause of redemption, the lessor cannot *declare* against the *mortgagee* in *covenant* as assignee, of all the estate, right, title, interest, &c. of the mortgagor, even after the *mortgage* has been *forfeited*, unless the mortgagee has taken *actual possession.*

Eaton v. Jacques. 438 to 444

28. This

Douglas.

28. This was an action of debt for rent against the defendant as assignee of the original lessor; the defendant was Mortgagee, assignee. a mortgagee, and the mortgage was made in the form of an assignment of all the lessor's term (which should regularly have been by an under lease leaving a reversion of a day in the mortgagor,) it was adjudged that the mortgagee could not be sued as assignee, he having never taken actual possession, and even though the mortgage had been forfeit; for the mortgage is only a conditional security for money, not an actual transfer of property. Page 442

29. *Per Lord Mansfield.* The mortgagee never asks whether the rent be paid—the consequences would be terrible if a mortgagee might be called upon years after the re-assignment for arrears or breaches of covenant during the assignment. Ib.

30. But under an absolute assignment of a term, the assignee may be sued on the covenants before he has taken Absolute assignment before possession. actual possession—*per Lord Mansfield*—this seemed to be the case of waste unprofitable ground where actual possession could not take place—by the assignment the title and possessory right passed and the assignee became possessed in law. Ib. in note 444 to 446

31. An assignee takes the thing assigned subject to all the equity to which the original party was subject; but this rule does not apply to the holder of a bill of exchange or promissory note, it would stop their currency:—a fair holder has nothing to do with the original transaction, unless perhaps in a single case which is a hard one, of money won at play. Assignee subject to original equity.

Peacock v. Rhodes. 614

Per Lord Mansfield.

32. On a declaration that all an original lessor's estate came to the defendant by assignment, and a plea that all &c. did not come, &c. *modo & forma* and issue joined, evidence of an underlease will not support the issue. Under lease.

Holford v. Hatch. 174. to 178

33. Nor will evidence of an assignment of all the original lessor's estate in part of the demised premises. All estates in part, &c. 176. n.

34. *Attornment*

Douglas.

Attornment.

34. *Attornment* since the statute of 4 Ann, cap. 16. §. 9. need not be averred in a declaration in covenant for rent.

Moss v. Gallimore. Page 270

35. Nor in an *assessory*.

Id.

Rent accru-
ing after assign-
ment.

36. The assignee of a term *declared against as such*, is not liable for rent accruing after he has assigned over, though it be stated that the lessor was a party executing the assignment, and *agreed* thereby that the term which was determinable at his option should be absolute.

Chancellor v. Poole. 735 to 737

Privity of
estate of con-
tract.

37. If defendant was lessee or had covenanted personally with the plaintiff, he was liable for breaches of covenant happening after the assignment of his interest, because though the privity of the *estate* was gone, the privity of *contract* still remained between him and the lessor if he was only an assignee, there never was any privity of contract between them, and therefore he ceased to be liable as soon as his assignment over put an end to their privity of estate. *Id.*

Privity of
estate, moiety
of rent.

38. (If lessee for years assigns his whole term in the moiety of the land, the lessor may have an action against the assignee for the moiety of the rent; for the assignee having the entire estate in the moiety of the land, he hath a sufficient privity of estate to be charged by the lessor if he pleased with the moiety of the rent.) 2 *Lev.* 231

Reversion,
privity.

39. (*Termor* assigning for a fewer number of years than he has, may distrain for the rent without any power reserved for that purpose, though a person who assigns his whole interest cannot, because he has no reversion; but there is no privity between such derivative lessee and the original lessor as between lessor and assignee, and therefore though such one take the whole term except one day, he shall not be liable to any of the covenants in the original lease. 3 *Bac. Ab.* 399.)

1 *Durnford and East.*

Chose in ac-
tion.

40. Though a *chose in action* cannot strictly in law be assigned, yet, in equity it may; and in the case of a policy of insurance, the court will so far take notice of an assignment as to permit an action to be brought in the name of the assignor.

Delaney v. Stoddart. 261

1 Darnford and East.

41. The assignor of a chose in action who is become a bankrupt, may sue the debtor for the benefit of the assignee. *Id.*

Winch v. Keely. Page 619

42. Nothing can excuse the lessee from paying his rent to the assignee but *actual payment* to the original lessor without notice of the grant, and if that be his case he may plead it. Payment to original lessor.

Birch v. Wright. 386

3 Darnford and East.

Per Buller, J. The half pay of an officer actually due, may be assigned like another debt; but this does not extend to future accruing payments. Half-pay officer.

Flarty v. Odum. 681

4 Darnford and East.

43. The future half-pay of an officer is not assignable. Half-pay.

Lidderdale v. Duke of Montrose. 248

44. An assignment of a chose in action need not be by deed. Chose in action.

Howell v. Mac Ivers. 690

45. See observations on the doctrine of assignment of choses in action. By Buller, J. Assignment of.

Master v. Miller. 340

Hen. Bl.

45. The full pay of a military officer cannot be assigned. Officer's pay.

Barnicke v. Reade. 627

It is contrary to the policy of the law that a stipend given to one man for future services should be transferred to another who could not perform them. *Ib.*

Vernon and Scriven.

46. Assignment of a lease may be laid without a venue, for it is to be presumed to have been made on the land. Venue.

2 H. B.

A covenant in a lease, that the lessee his executors and administrators shall constantly reside upon the demised premises during the demise, is binding on the assignee of the lessee though he be not named. Covenant to reside.

Tatem v. Chaplin. 133

Assumpsit.

Definition
and nature of.

1. **ASSUMPSIT** is an action the law gives a party injured, by the breach or non-performance of a contract legally entered into; it is founded on a contract, either express or implied by law, and gives the party damages in proportion to the loss he has sustained by the violation of the contract.—The law distinguishes between a general *indebitatus assumpsit* and a special *assumpsit*, the first seems to be of a superior nature, the latter lies in the case of a particular undertaking of a collateral promise to discharge the debt or duty of another.

1 *Bacon Ab.* Page 163

Express.

2. A promise is in the nature of a verbal covenant, and wants nothing but the solemnity of writing and sealing, to make it absolutely the same, if therefore it be to do an explicit act, it is an express contract as much as any covenant; and the breach of it is an equal injury, but the remedy there is only an action on the case for the *assumpsit*, or undertaking of the defendant, the failure of performing which, is the wrong or injury done to the plaintiff, the damages whereof, a jury are to estimate and settle; the express undertaking, may be either by parol or in writing, as by note not under seal, and the payee by common law, or by custom, and act of parliament, the indorsee may recover the value of the note in damages. Some agreements indeed, though ever so expressly made, are deemed also of so important a nature, that they ought not to rest in verbal promise only, which cannot be proved but by the memory, (which sometimes will induce the perjury of witnesses.)
(See frauds and Stat. of.)

Implied.

3. Implied *assumpsits* arise from the general implication, and intendment of courts of judicature, that every man hath engaged to perform what his duty or justice requires—as when a man performs work for me, he is at liberty to suggest, that I promised to pay him as much as he reasonably deserved—so if he sells goods—so if I receive money which I ought not to retain, there is an implied *assumpsit*, that I promised to account for it—so upon a stated account a promise arises to pay the balance.

3 *Black. Comm.* 157, 161

4. In

4. In an action on the case on what is called an *indebitatus assumpsit*, which is not brought to compel a specifick performance of the contract, but to recover damages for its non-performance, the implied *assumpsit*, and consequently the damages for the breach of it, are in their nature indeterminate, and will therefore adapt and proportion themselves to the truth of the case, which shall be proved, and if any debt however, less than the sum demanded be proved, the law will raise a promise, *pro tanto*.

3 *Black. Commen.* Page 154

See history and progress of the action.

History.

Impey's Modern Pleader. 155 to 160

Holt.

5. *Indebitatus* lies against an attorney for prothonotary's fees.

Attorney.

Spearman v. Moreland. 20, 21

6. *Indebitatus assumpsit* lies when money is received without consideration, or upon a void one.

Void consideration.

Martin v. Sitwell. 25

7. Lies upon a promise if it happen within the year, though it might not happen in a long time, and be barred by the stat. of fraud.

Promise within year.

Francom v. Foster. 25, 26

8. Where the contract is entire, and the duty precedent, a demand is not necessary.

Demand where necessary.

Masters v. Marriot. 26

9. Not barred by a release preceding the promise, where the plaintiff could not have had an action on the defendant's promise before the making of the release.

Release preceding promise.

Thorpe v. Thorpe. 28

10. Lies on mutual promises.

Ib.

11. And it is sufficient if the plaintiff avers, he has done all on his part.

Performance.

Ib.

Delivery of a note shall be considered as absolute and indefinite, it is evidence of a debt, and therefore the parting with it is a good consideration to maintain an action.

Note delivered.

Meredith v. Short. 34

12. Receiving

Holt.Necessaries,
guest.

12. Receiving and finding necessities, is receiving as a guest, and not as a servant, 'till the contrary is shewn.

Gould v. Johnson. Page 34Fraudulent
breach.13. *Indebitatus* lies not, but case special, where the defendant has cheated the plaintiff of his money, and has not performed his agreement.*Dewberry v. Chapman.* 35, 36Rent received
as husband.14. Where the defendant being married to another, received plaintiff's rent as her husband, *indebitatus assumpsit* lies.*Affer v. Wilks.* 36, 37Foreign at-
tachment.15. If an attachment (by the custom of *London*) and condemnation be before the writ purchased, it may be given in evidence on the general issue in *assumpsit*, because that is an alteration of the property before the action brought.*Brook v. Smith.* 285(See *Salkeld* 280 & 291.)Letter pro-
mising, not
sufficient evi-
dence.16. On *indebitatus assumpsit* for money lent, money received to the plaintiff's use, and *insimul computasset* the defendant's letter, promising shortly to pay the plaintiff 30*l.* which he owed him, not sufficient evidence, because it might be due upon a bond or otherwise.*Sir Willoughby Aston v. Roper.* 290(See *Comberback* 349)Entries by
servant, shop
book.

17. A shop-book good evidence on proof, that the servant who was accustomed to make entries was dead, and his hand-writing, and no proof necessary of delivery of goods.

Pitman v. Madox. 298Drayman's
entries.

18. The usual course of dealing in trade is proper evidence, as entries of beer delivered by drayman—death of drayman, and his hand-writing proved.

Price v. Earl of Torrington. 300Want of con-
sideration.19. A promise without a consideration will not support an *assumpsit*.*Walker v. Walker.* 328*Indebitatus as-
sumpsit*, debt.20. *Indebitatus assumpsit* will not lie, but where debt lies.*Smith v. Aicry.* 329(See *Burroto* 1008.)

21. Plaintiff

Salkeld.

21. Plaintiff declared that in consideration, &c. the plaintiff would deliver to the defendant, &c. the defendant promised to pay, &c. but does not alledge a place where; held ill, for being a consideration executory it is traversable.

Sexton v. Miles. Page 22
(*V. Strange* 806.)

Express contracts are where the terms of the agreement are openly uttered and avowed at the time of the making. Express contract.

Wilkin v. Wilkin. 9

(An express contract takes away the contract implied by law. *Allen* 94.)

22. Where one receives money to another's use, *assumpsit* for money had and received lies against the receiver.

Money received to use of another.

Palmer v. Stavelly. 24, 27, 28

(*V. 2 Show. 21. pl. 14. 2 Mod. 260. 2 Mod. 263. Comb. 303. 5 Mod. 13. 10 Mod. 315. Show. 157.*)

23. And where one pays money by mistake on an account, or by any mere deceit; he may have this action.

Payment mistake, deceit.

Tomkins v. Bernet. 22

(See *Cowper* 199 & 792. *Doug.* 671. 2 *D. & E.* 763.)

24. But not where it is paid knowingly upon an illegal consideration.

Paid knowingly upon illegal consideration.

(Cases where money had and received held not to lie. 2 *Burr.* 1012. 4 *Burr.* 1986. 5 *Burr.* 2569. 2 *Bl.* 685. *Cowp.* 793, 790, 754, 566, 414, 819; 69. *Doug.* 18. 2 *D. & E.* 360. 3 *D. & E.* 125.)

25. Does not lie where money is paid by an obligor, upon any usurious bond.

Id.

26. Nor for money delivered to a solicitor, &c. to bribe custom-house officers, &c. and laid out accordingly.

Money laid out to bribe.

Id.

27. It lies for one that pays money on a policy of insurance, believing the ship lost when it is not.

Payment, insurance, ship lost.

Id.

On an implied promise, you may declare by way of a general *indebitatus assumpsit*.

Id.

*Salkeld.*To pay new
for old money.

28. It lies on a promise to pay so much new money in consideration of so many pieces received of old money.

Herbert v. Borlough. Page 25

To pay money in consideration of note.

29. So on a promise to pay 50*l.* in consideration of a note of 50*l.* under a third person's hand, delivered by the plaintiff to the defendant.*Meredith v. Short.* 25

Note evidence of debt due.

30. For the note being evidence of a debt due, the parting with it is a good consideration. *Ib.*

Necessaries as guests.

31. So in consideration that the plaintiff would receive A. &c. into his house *ut hospites*, and find them meat, &c. with an averment that he did receive, &c. tho' not said *ut hospites*.*Gould v. Johnson.* *Ib.*

Consideration acceptance of third person as debtor.

32. So in consideration that the plaintiff would accept the defendant to be his debtor, instead of A. with averment that he did accept, &c. and held good after verdict though no express averment that A. was discharged.

Roe v. Haugh. 26

Promise collateral.

33. But not against B. for money lent A. at B.'s request, because the promise is only collateral.

Butcher v. Andrews. 23

34. A note may be given in evidence as a paper or writing, to prove the defendant's receipt of so much money from the plaintiff.

Hard's Case. 23(A bill of exchange may also be given in evidence on an *indebitatus Assumpsit*. *Lutwiche, 1585.—2 Strange. 719*)Stranger promises to pay amount of execution against 3^d person.35. *Assumpsit* lies against a stranger on his promise to pay the debt if the officer would restore goods taken on a *fiери facias*.*Love's Case.* 28

Conditional promise.

36. It lies on a conditional promise, as, "prove it, and I will pay you within six years." *Heyling v. Hastings.* 29

By executor after administration repealed.

37. It lies by an executor against one that receives money by order of an administrator, administration being repealed, a will having appeared.

Jacob v. Allen. 27(V. 3 *Durnford and East* 125. Executor. 1st Lord Raymond 742.—*Newdigate v. Davy.*)

Collateral promise, whole credit, &c.

38. Where the defendant comes only in aid of another, so that there is a remedy against both, it is a collateral promise,

mise, and void by the statute of frauds, otherwise when the whole credit is given to the defendant.

Birkmyr v. Darnell. Page 27.

Salkeld.

39. *Assumpsit* by an executor on a promise to himself for a debt to the testator, and the statute of limitations is pleaded, he cannot give in evidence a promise to himself *infra sex annos*. By executor, statute of limitations.
Deane v. Crane. 28

40. Payment of money due to the wife as executrix, is not evidence to maintain an action for money received to the husband's use—the contract to pay was to the person in a different capacity from that declared on. *Anonymous.* 282

41. A. living, a former wife marries B. and receives her rents, &c. B. may have *indebitatus assumpsit* against A. for so much money received to her use. Baron living, first wife receives rents, &c.
Hoffer v. Wallis. 28

(11 *Mod.* 146—12 *Mod.* 324.)

42. It lies where in consideration the plaintiff promise to marry the defendant, she promised to marry him because mutual promises. Promise of marriage.
Harrison v. Cage and Wife. 24

43. But if the promise be on one side only, or if that on either side is not binding, the whole is *nudum pactum*. *Id.*

(If the promise alledged be proved, yet if it appear to be made on a consideration different from that alledged, or on that and another consideration, the declaration is not supported. *King v. Robinson. Cro. Eliz.* 79.)

(*Cro. E.* 79.—So if plaintiff declares on two considerations, he must aver the performance of both. *Cro. J.* 503 If some of the considerations are good, others bad, proof of the former is sufficient—if all are good, all must be proved. *Cro. J.* 149.—vide *Dougl.* 15.—1. *Durnford and East.* 448.)

44. The day is immaterial in *assumpsit*, and the plaintiff is not tied to a precise day in his declaration, if therefore the defendant force him to vary it is no departure.

Howard v. Jennison. 223
(V. *Strange* 21—806. 1 *Durnford and East.* 116.)

1st Lord *Raymond*.

45. In consideration that the plaintiff would forbear to arrest the defendant's son till after the twenty third of October, to pay on or before that day, good. Consideration, forbearance.

Waters v. Clapp. 357

1st Lord *Raymond*.Forbearance,
consideration.

46. In consideration that the plaintiff would forbear to sue for a debt due to his wife as executrix with averment that she is living.

Yard v. Eland. Page 368Promise of
marriage.

47. A promise of marriage is good without writing.

Harrison v. Cage. 387Fine by cor-
poration.*Indebitatus Assumpsit* does not lie for a fine imposed by a corporation.*Mayor and Corporation of York v. Toun.* 502Account set-
tled, venue.48. In *assumpsit* on an *insimul computasset* the time and place must be laid where the account was settled, i. e. then and there sold, &c.*Desborough v. Kelby.* 533Disjunctive
promise.49. *Indebitatus assumpsit* must be laid in the disjunctive on a disjunctive promise, as in the case of a promise to deliver goods *on or before* such a day, &c.*Harman v. Oruden.* 620Release on
equity of re-
demption.50. Release of an equity of redemption good considera-
tion of an *assumpsit*.*Thorpe v. Thorpe.* 663Mutual pro-
mise, perform-
ance.51. Where mutual promises are made, one is the consi-
deration of the other, and performance need not to be
averred.*Ib.* 664Account stated,
general issue.52. Account stated amounts to the general issue in
assumpsit.*May v. King.* 680(V. Bur. 9. 3 Lev. 238. For a *chose in action* cannot
discharge a matter executed.)Money paid
on order rever-
sed.53. Money is paid upon an order or judgment which is
afterwards quashed or reversed, *assumpsit* will not lie.*Mead v. Deane.* 742

(2 Burr. 1005. 1 Bl. R. 219.)

Paid on void
authority.54. *Assumpsit* will lie for money paid in pursuance of a void
authority. The authority here was the High Commission
Court.—The action was after the Revolution.*Sir Richard Newdigate v. Davy.* 742

(1 Salk. 27. 1 D. & E. 59. 732. 3 D. & E. 125.)

Indebitatus

2 Lord *Raymond*.

Indebitatus assumpsit for money lent does not lie upon a special promise to repay money advanced upon a bill, in case the bill be not paid, but a special action lies.

The Governor and Company of the Bank of England v. Glover. Page 753

(See *Marriot v. Lyster*. 2 Wils. 141. & *Balber v. Andrews*. 1 Salk.)

Money lent lies not on special promise to pay money advanced on bill.

55. The delivery of a promissory note is a good consideration of an *assumpsit*, although the note was given without consideration at first, for the defendant has admitted it to be a good consideration by his promise.

Delivery of note, consideration.

Meredith v. Chute. 759

56. *Assumpsit* in consideration that the plaintiff would receive A and B *ut hospites*, the plaintiff shews that he received them, and found them with meat, drink, &c. but does not say *ut hospites*, and held well.

Consideration to receive as guests.

Gould v. Johnson. 838

57. *Indebitatus assumpsit* for foreign money.

Bennett v. Verdun. 841

Indebitatus assumpsit for foreign money.

58. *Assumpsit* without a nominative case intended of the defendant where three persons are not named before.

Sheer v. Brown. 899

Assumpsit without saying who assumed.

59. One who undertakes to do a thing voluntarily, and mismanages to the plaintiff's damage, is chargeable without shewing a consideration.

Bailment without consideration.

(See case.)

Coggs v. Bernard. 919

60. *Assumpsit* implies not only a promise to perform, but an entering upon the undertaking.

Ib. 919

Assumpsit what implied by.

61. Being entrusted with money or goods is sufficient consideration of a promise to re-deliver them.

Ib. 920

Promise to re-deliver, trust.

62. Lies for providing meat, &c. for J. S. and J. D. at the defendant's request, for it is a contract between the plaintiff and defendant, and no action lies against J. S. or J. D.

Jordan v. Tomkins. 982

Providing necessities for A at B's request.

63. Money is allowed to remount troopers and a captain receives it in horses. One of his soldiers who is discharged may recover the value of a horse in an action for money received to his use.

Contract for government.

Norris v. Napper. 1007

64. *Assumpsit*

Special agree-
ment.

2 Lord *Raymond*.

64. *Assumpsit* to pay two grains of rye on Monday, and four grains next Monday, and so on doubling the number every Monday for a year, is binding.

Thoraborow v. Whitacre. Page 1164

Power from
administrator,
will found.

65. One who has received money under a power from an administrator and paid it over, is not answerable in *assumpsit* to the executor after a will found.

Pond v. Underwood. 1210

Consideration.

66. In consideration of a promise that the defendant should hold lands clear of a rent granted to J. S. without molestation of the plaintiff, bad after verdict, for want of shewing that the rent was vested in the plaintiff, for otherwise no consideration.

Courtenay v. Strong. 1217

Strange.

67. In an *indebitatus assumpsit* the day is not material, and alledging a different day in the replication is no departure, it is only a defect in form, which cannot be taken advantage of but upon special demurrer.

Cole v. Hawkins. 21

(*Matthews v. Spicer*. St. 806. and *Salk*. 223.
1 D. & E. 116.)

68. If the defendant should be allowed by artificial pleading to make the time and place matter of substance, the doctrine of transitory actions would fall to the ground. *Ib.*

Request.

69. To pay for a set of sails upon request, a special request need not be laid, for on making the sails a duty was vested and the money became due.

Wallis v. Scott. 88

Forbearance.

70. (a) Forbearance is no consideration where there was no cause of action before; in this case a married woman gave a promissory note as a *feme sole*.

(*v. Hob.* 216.)

Loyd v. Lee. 94

70. (b) Promise to pay in consideration of unspecified forbearance is void—the forbearance might be for an hour which would be a frivolous and inadequate consideration.

Lutwich v. Hussy, Cro. E. 19

(*v. Hob.* 216. *Hutt.* 108.)

71. In *assumpsit* by assignee of bankrupt sufficient to lay an *assumpsit* to the bankrupt without laying any to the assignee, being like the case of an executor who always declares

clares on a promise to testator, for the promise is as strongly transferred to the executor as here to the assignee.

Rig v. Wilmer. Page 697

72. Where the thing contracted for is not delivered, the money paid for it is received to the other's use.

The thing
contracted for
not delivered.

Anonymous. 407

(*Quantum meruit* for wares sold, alledging no notice of the value demanded. *Per Cur.* the notice is not transferable, for he that buyeth must know the value, and may tender so much as he thinks it is, and plaintiff must go on for the rest.

Lomax v. Boyl. 3 *Keb.* 610.)

(The goods sold need not be specified. *Cro. Jac.* 206. so for work and labour generally. *Carth.* 276. *Vent.* 44.)

73. (a) A stranger to the consideration (i. e. a party from whom there was not a consideration moving) can maintain no action.

Stranger to
consideration.

Crow v. Rogers. 592

73. (b) (The party by whom the promise is made must be concerned in the meritorious cause of it, except where there is a natural debt as between parent and child.—*v. 1 Roll. Ab.* 6 & 32. *p. 13.* 1 *Vent.* 318.—*Sir T. Jones* 103.—*Cro.* 164.) *Bull. N. P.* 134.

Id.

(*Assumpsit* will not lie for money lent to the son at the father's request; but had it been for so much money paid by the plaintiff at the request of the defendant the father to the son it might have been good; for then it would be the father's debt and not the son's.

Consideration
money lent to
the son.

Butler v. Andrews. *Carth.* 446. *Comb.* 470. 2 *Brownl.* 40.

Action lies for medicines provided and delivered for an infant daughter against the father. *R. Ray.* 67.—but the declaration must state for physic provided and delivered for the daughter, at the request of the father, and not to the daughter.

Keb. 439

74. If there be a count on a special agreement, and also on a *quantum meruit*, and a different special agreement be proved, plaintiff cannot recover on either count— not on the latter, because there was a special agreement, not on the former because of the variance. *Weaver v. Boroughs.* 648

(See *Dougl.* 628.)

75. An

Strange.

75. An usurious contract may be given in evidence on
non assumpsit. Lord *Bernard v. Saul.* Page 498

Accord and
satisfaction.

76. Accord and satisfaction is a good plea in bar of
assumpsit, but it must appear to the court to be a reasonable
satisfaction, and accepted by the plaintiff as such.

Cumber v. Wane. 426

(V. 2 D. & E. 24.)

Work done in
expectation of
legacy.

77. (a) No action lies for work done in expectation of a
legacy. *Osborne v. Governors of Guy's Hospital.* 728

78. (b) For the jury ought to consider how it was under-
stood by the parties at the time of doing the business, and a
man who expects to be made amends by legacies, cannot af-
terwards resort to his action. *Ib.*

Fees.

79. Fees to Usher of Black Rod recovered.

Sir William Saunderson v. Brignall. 747

(V. *Salk.* 78.—330.)

Repairs of
ship.

80. Masters of ships and owners are generally liable to
repairs, but if undertaken on a special promise from either;
the other is discharged. *Garnam v. Bennett.* 816

(V. *Cowp.* 636, 639.—1 D. & E. 108.—1 *Hen.*
Bl. 114.)

Money ex-
torted, duress.

81. Where money is extorted by duress of goods, *assump-*
sit will lie for it as for the surplus above legal interest up-
on goods pawned and redeemed. *Afley v. Reynolds.* 915

(V. *Dougl.* 671.—2 *Bur.* 1012.—*Cow.* 805.—2 D.
& E. 763.)

Past consider-
ation.

82. *Assumpsit* will not lie for a past consideration, as for
work and labour unless it was at the request of the party.

Hayes v. Warren. 933

(V. *Hob.* 107.—*Cro. E.* 282.)

Remedy of
higher nature.

83. Where a man has covenanted to account for money
to be received to another's use, *assumpsit* will not lie, the plain-
tiff having a remedy of an higher nature under hand and
seal. *Bulstrode v. Gilburn.* 1027

Day imma-
terial.

84. (a) In *assumpsit* the day is not material, and the plain-
tiff may alledge a different one in his replication; the promise
declared

declared on was on the 26th of *March*, and by the replication it appeared the bill was fyled the 12th of *February* before.

Matthews v. Spicer. Page 806

V. Cole v. Hawkins. St. 21.

84. (b) (In all cases where money is to be paid on an executory consideration, the plaintiff should set out the day when, and the place where the consideration was performed, for it is traversable. *Morris v. Kirke. Cro. El.* 73)

See *Show. 50*—and *Salk. 22.*

1st *Wilson.*

85. Promise for promise is a good consideration in an *assumpsit*, without an averment of the plaintiff's performance of his promise. *Martindale v. Fisher.* 88

Promise for
promise, con-
sideration.

(If plaintiff avers performance, he must shew how performed. *Cro.* 292)

2d *Wilson.*

86. A foot race is a game within the stat. 9 *Ann* against gaming, but it must appear that a man was playing at such game, or else a wager above 10l. laid upon his side, is not a betting within the statute.

Lynall v. Longbotham. 36

(*V. Poje v. St. Leger. Salk. 344.*)

(Parol loan of money lent to play with is not void. 2 *Str.* 1249. 1 *Bl.* 234, 256.)

87. *Assumpsit* against defendant for money lent to a third person bad after verdict and judgment arrested—*per curiam*, the word lent is a technical term, and no man can be indebted to another for money, unless the money be actually lent to that person himself; it is absurd to affirm, that A. is indebted to B. for money lent to C. for the same money cannot be lent to two persons severally, there cannot be a double debt upon a single loan.

Marriott v. Lister. 141. vol. 2.

Plaintiff might have declared for money delivered to such a person at the request of defendant.

Impey's Modern Pleader. 193

(*V.. No. 73. assumpsit.*)

88. And

Money lent
to wife.

3 *Wilson*.

88. An *indebitatus assumpsit* for money lent to the wife, at the request of the husband, is a good count, for it is the same as lent to the husband himself.

Stephenson v. Hardy. Page 388

1 *Blackstone*.

Illegal con-
sideration.

89. Promise of a bribe to a sheriff's officer to induce him to take bail is an illegal consideration, and will not maintain *assumpsit*.

Smith v. Stotesbury. 204

Money reco-
vered *mala fide*,
inferior court.

90. If one recovers money *mala fide* by suit in an inferior court, *indebitatus assumpsit* will lie in K. B. to make him refund it back.

Moses v. Macpherson. P. 33 Geo. 2. 219

2 *Blackstone*.

Assignment of
uncertain debt.

91. *Assumpsit* will lie for not paying the consideration of an assignment of an *uncertain* debt. P. 12 Geo. 3.

Monsdale v. Birchall. Cam. Stacch. 820

Money fairly
due, though not
recoverable.

92. *Assumpsit* will not lie to recover money back, paid by A. to B. if the same was fairly due, though the payment of the same could not have been compelled by law.

Farmer v. Arundel. Trin. 12 G. 3. 824

Per de Grey, Ch. J.—Money due in point of honor and conscience, tho' a man is not compellable to pay it, yet if paid shall not be recovered back, the action for money had and received, being considered as an equitable action. *Ib.*

Creditor of
bankrupt levies
his debt.

93. *Assumpsit* will lie for the assignees of a bankrupt against a creditor, who has levied his debt by *fiery facias*, subsequent to the act of bankruptcy.

Hutchin v. Campbell. Tr. 12 Geo. 3. 779 & 827

Two personal
actions, same
cause.

Per Curiam.—Though the assignees may have their election to bring tort or contract, *trover* or *assumpsit*, they cannot bring both—one personal action not going on to judgment, is no bar to another for the same cause of action, but if judgment is had on the merits, then it bars all other personal suits for the same cause of action. *Ib.*

In this case *trover* was brought by the assignees, and there was a verdict for defendant, which was held a bar to the action of *assumpsit*. *Ib.*

94. *Assumpsit*

2 *Blackstone.*

94. *Assumpsit* will lie for a *loan* to the wife, at the request of the husband.

Loan to wife,
request of husband.

Stevenson v. Hardie. H. 13 Geo. 3. Page 872

95. General *indebitatus assumpsit*, for money had and received, will lie for the assignee of a *respondentia* bond, the obligor having before-hand engaged by indorsement to pay the same to any assignee. *Per Cur.*—When the assignment is executed, the money is demandable by virtue of that *assumpsit*.

Respondentia
bond.

Fenner v. Meares. H. 19 Geo. 3. 1269

96. (a) Money paid as a premium for insuring lottery tickets may be recovered back, tho' the winnings if any, cannot be recovered, the contract being void by Stat.

Lottery insurance.

Jaques v. Golightly. 1073

(v. *Cowper* 790. *Hen. Black.* 65.)

Per Blackstone J.—On the part of the insured, the contract on which he has paid his money is not *criminal*, but merely *void*; and therefore having advanced his premium without any consideration, he is entitled to recover it back.

Ib.

2 *Burr.*

96. (b) Action on the case for money had and received to the plaintiff's use, C. gave four promissory notes to A. for 30s. each, A. indorsed them to B. in order to enable B. to recover the money in his own name against C. but he signed an agreement—"that A. should not be liable to the payment of the money, or any part of it, nor be prejudiced nor put to any costs, nor any way suffer by reason of such his endorsement," notwithstanding which express agreement in writing, and contrary to it C. sued A. in the Court of Conscience on each of the four notes as indorsee, and received 6l. of him under the order of that court, though A. tendered and offered to prove to them the said indemnity and agreement signed by C. which the commissioners thought they had no power to judge of, and that it was therefore no sufficient bar to the suit in this court, they therefore decreed for C. in one of the causes, and A. paid in the money upon the three others, and C. took out the whole by order of the commissioners, it was resolved.

Money recovered by fraud.

Moses v. Macferlan. 1006

97. That A. may recover this money from C. in the present form of action, viz. "for money had and received to his use,"

Id.

"use," he may *waive* any demand upon the scot of the indemnity for the *costs* he had been put to, and bring this action to *recover the 6l.* which C. got and kept from him iniquitously.

Moses v. Macferlan. Page 1006

2 Burr.

Indebitatus assumpsit, debt.

98. An action of *assumpsit* will lie in many cases where *debt does lie*, and in many where debt does *not* lie.

Ib. 1008

Indebitatus assumpsit, debt.

99. (a) *Per Lord Mansfield.*—It is said, that no *assumpsit* will lie where an action of debt may not be brought; some sayings at *nisi prius* are quoted in support of that proposition, but there is *no foundation* for it, it is much more plausible to say, "that where debt lies an action *upon the case* ought *not* to be brought," and that was the point relied on in *Slade's case*, 4 Co. 91, but the rule then settled and followed ever since is, that an action of *assumpsit* *will lie* in many cases where debt lies, and in many where it does *not* lie. *Ib.*

Wager of law.

99. (b) A main inducement originally for *encouraging actions of assumpsit* was to take away the *wager of law*.

Ib.

Obligation, ties of natural justice.

100. If the defendant be under an *obligation from the ties of natural justice* "to refund," the law *implies a debt*, and gives *this action*. *Ib.*

Money received under lawful authority.

101. *This species of assumpsit* lies in many instances for money received from a *third person* under *lawful authority*.

Ib. 1008, 1009

Defendant not entitled to retain.

102. The ground of the present action is, "that the defendant ought not to *keep* the money." *Ib.*

Illegal consideration.

103. *Illegal* consideration shall not be assisted by the court, nor *helped by verdict*, (where it appears upon the face of the declaration to be illegal.)

Stotesbury v. Smith. 926 to 928

104. A. promises to pay money to sheriff's officer, in consideration "that he would accept of the prisoner, and A. R. to be bail for the person arrested," is an *illegal consideration*. *Ib.*

See Statutes, 23 Hen. 6. C. 10.

Beneficial action.

105. This action is *beneficial* both to *plaintiff* and *defendant*.

Moses v. Macferlan. 1010

106. The

2 Burrow.

106. The plaintiff may *declare generally*, and make out his case at the trial.

Moser v. Macferlan. Page 1010

Plaintiff may declare generally.

107. The defendant can be *liable no further than the money he has received*, and against *that* may go into an *equitable defence* upon the general issue, *claim every equitable allowance*, prove a *release without* pleading it, and defend himself by whatever may shew that the plaintiff *ex equo et bono* is not intitled to the whole or any part of his demand. *Ib.*

Equitable defence, release. Allowance *ex equo et bono*.

108. This *action* is a *bar* to the plaintiff's bringing an action upon the agreement, (though he might recover more in that action than in this.) *Ib.*

Bar to another action.

109. This action lies for money, which the defendant *ex equo et bono*, ought not to keep. 1011, 1012

When defendant ought not to retain.

110. It lies not for money paid as due in *honour and honesty*, though not recoverable by law. 1012

Money paid, honourable obligation.

111. As payment of a debt *barred* by the statute of limitations. *Ib.*

Debts barred by statute.

112. Or contracts during infancy. *Ib.*

Contracted in infancy.

113. Or the extent of principal and *legal* interest upon an usurious contract. *Ib.*

Principal and interest, usurious contract.

114. Or money fairly lost at play. *Ib.*

Money lost at play.

115. But it lies for money paid by *mistake*, or upon a consideration which *happens to fail*, or upon money got through *imposition*, (express or implied) *extortion*, *oppression*, or under *advantage* taken of the plaintiff's situation, contrary to law made for protection of persons under those circumstances. *Ib.*

Payment by mistake.

116. The gift of *this* action is, that the defendant upon the circumstances of the case is *obliged* by the ties of *natural justice* and *equity* to *refund* the money.

Gift, obligation to refund.

3 Burrow.

117. A *ship* under repair by a ship-wright in a dock belonging to the ship-wright, but for the *use* of which dock the owner of the ship was to pay him 5l. was *burnt* by a fire communicated from land before the repairs were fully completed

Act of God.

completed, the ship-wright shall maintain his *action for work, labour, and materials.*

Menetone v. Athawes.

Page 1592 to 1595

Nudum pactum.

118. The idea of *nudum pactum* was calculated to prevent inconvenience from *hasty inconsiderate* promises and undertakings.

Pillans & Rose v. Van Mierop & Hopkins. 1668

Objection removed, undertaking in writing.

119. But the objection does not hold, when the undertaking is *in writing.* 1669 to 1671

Suspension of right.

120. A *departure from any right or suspension of pursuing it,* is sufficient to graft a verbal promise upon. 1669 to 1672

Nature of *nudum pactum.*

121. The notion and *idea* of it came into our law from the *civil law.*

From civil law.

122. *Bracon* is the first of *our* lawyers that mentions it. *Ib.*

Plowden adopts it, and explains it agreeably to the *Roman law.* 1671

Equitable demand.

4 *Burrow.*

123. In action for *money had and received for the plaintiff's use,* the plaintiff can recover no more than what he is in conscience and equity intitled to.

Dale v. Sollet. 2133

Against principal, not receiver, &c.

124. Action on the case for *money had and received for the plaintiff's use,* ought to be brought against the *principal,* not against a *receiver or collector,* the right can't properly be tried in the latter.

Sadler v. Evans. 1985

Cowper.

An action for money had and received, will not lie against an excise officer for an over-payment.

Whitbread v. Brookbank. 69

Promise to pay a judgment debt.

125. A promise by the defendant himself, to pay debt and costs awarded by a judgment, is no ground on which to raise an *assumpsit,* for it is turning a *judgment debt* into a simple *contract* debt. *Aliter,* if such undertaking had been by a *third person* in consequence of such forbearance, then it would have been a good ground of *assumpsit* against such third person.

Anonymous. 128

Per

Cooper.

Per Ashburn, J.—The promise is no waiver or extinguishment of the judgment debt, but it still remains a lien on the land.

Anonymous. Page 128

126. A *parol* promise by A. to pay for goods sold to B. if B. *did not pay for them*, though made *before delivery* of the goods, is a collateral undertaking within the *statute of frauds*. Collateral promise.
Jones v. Cooper. 227

127. *Secus*, if the defendant had said "deliver the goods, and I will see them paid for." *Ib.* 228, 9

128. *Assumpsit* lies upon a promise by an executor, to pay a legacy in *consideration of assets*. By executor to pay legacy.
Atkins & Uxor v. Hill. 284

Per Lord Mansfield. When the executor has assented the legacy becomes a demand, which in law and conscience he is liable to pay, but here is an express promise. *Ib.*

129. S. P. determined in *Hawkes and Uxor v. Saunders.* *Ib.* 289

130. Where a man is under a *legal or equitable obligation* to pay, the law *implies* a promise; *a fortiori*, a legal or equitable *duty*, it is a sufficient consideration for an actual promise. Legal or equitable obligation or duty.
Ib. 290

131. So any *moral* obligation to pay is a sufficient consideration. Moral obligation.
Ib. 294
Per Bull. J.—the rule as to consideration of loss to the plaintiff or benefit to the defendant is too narrow. *Ib.*

132. An action lies to recover money won upon a wager, "whether a decree of the Court of *Chancery* would be reversed or not on appeal to the House of Lords," unless there be any fraud or circumstance that shew the motion to have been immoral or corrupt. Wager, reversal of decree.
Jones v. Randall. 37

133. If the wager had been made with one of the Lords or one of the judges, or with a counsel or attorney *in the cause*, it would have been illegal. If with counsel, &c. illegal.
Ib. 39, 40.

Per

Cowper.

Per Lord Mansfield—Contracts not prohibited by *positive law*, nor adjudged illegal by *precedent*, nor contrary to principles of morality may nevertheless be *void*, as against principles of sound policy—this contract is equal between the parties.

Jones v. Randall. Page 39, 40

Voluntary
wager on the
sex, &c.

134. An action will not lie upon a *voluntary wager* between two indifferent persons on the *sex* of a third person who has appeared and acted as a man. 1. Because such enquiry tends to *indecent evidence*. 2. Because it tends to *disturb the peace* of the *individual* and of *society*.

Da Costa v. Jones. 729, 736

(The judgment was arrested in this case.)

In general
wagers allowed.

135. Wagers in general are allowed, unless where restrained by statute. *Ib.* 734

Unless tend-
ing to breach of
the peace.

136. But where a wager is laid upon a subject that tends to a breach of the peace, or a violation of chastity, or that is *contra bonos mores*, it is unlawful. *Ib.*

Or injurious
to feelings, &c.

137. So if it affect the interest or feelings of a third person. *Ib.*

This no ob-
jection in the
investigation of
right.

138. But wherever a question arises upon a real matter of right, it shall be tried, though the interest of third persons not parties may be affected by it. *Ib.* 736

(If a stake holder receive money of both parties pending a wager, the winner may maintain an action against the stakeholder; for upon the wager's being won, the money is actually the winner's, though he cannot recover it before the fact is made to appear. 10 *Mod.* 315. *Holt* 37. *Sid.* 4. *Show.* 157. He must at his peril take notice who it is that wins the wager. *Freem.* 264.)

Insurance.

139. A policy on the *sex* of a person is a *wagering policy* within the Statute 14 Geo. 3. chap. 48. by which “all insurances upon lives or any other event or events without any interest in the parties are made null and void.”

Roebuck v. Hammerton. 737

Exorbitant
fees.

140. Money had and received lies to recover the excess of exorbitant fees taken by a Custom-house officer from the master of a vessel, upon his taking out his cocquet and bond, pursuant to Stat. 13 and 14 C. 2. c. 11. s. 7. though the statute imposes the duty on the master personally, the owners may

may recover the excess in *assumpsit* for money had and received.

Stevenson v. Mortimer. Page 805

In an action for money had and received neither party shall be allowed to entrap the other in form. *Ib.*

If the parties go to trial upon an apprehension that there is one question only to be tried, the plaintiff shall not be permitted to surprize the defendant at the trial by another ground. *Ib.*

The plaintiff in this case gave notice that he meant to insist that too much was taken; and therefore both came to the trial with equal knowledge of the matter in dispute.

Notice.

(see this case in *Agent.*)

(v. 2 *Str.* 915. 2 *Burr.* 1012.)

141. If a rector give A. B. a certificate to the bishop and thereby appoint him curate of his church, promising to allow him a salary of so much, and to continue him in the office till otherwise provided of some ecclesiastical preferment, unless lawfully removed for any fault, the curate though discharged by the rector may maintain *assumpsit* for his salary, not having been provided with any ecclesiastical preferment or lawfully removed for any fault.

For curate salary.

Martyn v. Hynd. 437

142. A in consideration of 1l. 10s. 7d. received of B, undertakes in writing to be answerable for the due payment of G. H's note to the order of the said B, payable in five months afterwards; and before the note was due A became bankrupt, H did not pay the note when it became due, it was held that A's undertaking was a collateral engagement only in case H should not pay the note when due, and therefore it rested in contingency at the time of A's commission, consequently it could not be proved under it.

Collateral undertaking.

Ex parte Adney. 460

143. If money be paid by mistake to an agent and placed by him to the account of his principal but *not paid over* to the principal, *assumpsit* for money had, &c. to the use of the person who has paid it will lie against the agent; the mere *passing such money in account*, or *making rest* without new credit given, fresh bills accepted, or further sum advanced for the principal in consequence of it, is not equivalent to a payment over.

Payment to agent by mistake.

Buller v. Harrison. 565

Cowper.

Per Lord Mansfield.—The law is clear that if an agent pay over the money which has been paid to him by mistake, he does no wrong, and the plaintiff must call on the principal.

Buller v. Harrison. Page 565

Owners, master, necessities for ship.

144. *Assumpsit* lies against the owners of a ship for necessities furnished for it by order of the master, though the master be lessee of the ship for a term of years under covenant that he shall have the sole management and employ her for his own sole benefit, &c. and that he shall repair her at his own sole cost, and though such necessities were furnished without the knowledge of the owners or without their being known to the person who supplied them.

Rich v. Coe. 636

Notice of contract.

145. But if the person supplying such necessities (No. 11.) had notice of the contract between the owner and master, there might be ground to say he meant to absolve the owners.

Ib. 639

To recover back winnings, lottery.

146. *Assumpsit* for money had and received, will not lie to recover back winnings paid by the lottery-office keeper or insurer of lottery tickets to the insured in consequence of having insured his tickets contrary to the statute.

Browning v. Morris. 790

(*v. 2 Black. 1073.*—*Hen. Black. 65.*)

Lies to recover premiums of insurance.

147. But such action (No. 13.) will lie to recover the premiums of insurance paid by the insured to the lottery-office keeper.

Ib. 791

Per Lord Mansfield. The rule is in *pari delicto potior est conditio defendentis*; and it holds where the contract is executed and the money paid in *pari delicto*—for instance in bribery, if a man pays a sum of money by way of a bribe he cannot recover it in an action; but where contracts or transactions are prohibited by positive statutes for the sake of protecting one set of men from another set of men, the one from their situation and condition liable to be oppressed or imposed on by the other, there the parties are not in *pari delicto*; and in furtherance of these statutes the person injured after the transaction is finished and compleated, may bring his action and defeat the contract.—So in an usurious transaction the party injured may have an action for the excess. So a bankrupt who has obtained his certificate may maintain an action against a creditor who took a large sum of money to sign certificate.

Ib. 792

v. Lowry

Cowper.

(*v. Lowry v. Bourdieu*, Dougl. 452. Contract.) and *Smith v. Bromley*, Dougl. 671. Assumpsit; & *Cowper* 197. Assumpsit.)

148. Assumpsit for money had and received will not lie to recover an exorbitant demand.

Not to recover exorbitant demand.

Jestons v. Brooke. Page 793

In this cause (*Jestons v. Brooke*) A, in consideration of advancing 45l. for which he takes the borrower's note of hand, payable on demand, stipulates to have half of the profit upon a resale of certain goods intended to be purchased by the borrower with the money; two hours after the purchase, A demands payment of the note; and the same night puts a person into possession jointly for himself and the borrower—the neat profits upon a re-sale were 5l. the bargain is unconscionable, and therefore A shall not recover his share of the profits in an action for money had and received. *Ib.*

149. S. P. decided in *Plumbe v. Carter*, cited ibidem. See also,

Floyer v. Edwards. 112

150. Action for money had and received does not lie against an excise officer to recover back an over-payment.

Excise officer.

Whitbread v. Brooksbank. 67

151. Action for money had and received lies by the true owner of money or notes against a third person into whose hands they have come *mala fide*, provided their identity can be traced and ascertained.

By owner of money and notes.

Clark v. Shee and Johnson. 197

Per Lord Mansfield. This is a liberal action in the nature of a bill in equity, and if under the circumstances of the case it appears that the defendant cannot in conscience retain what is the subject matter of it, the plaintiff may well support his action.

Lord *Hardwicke* expresses his disapprobation of the case of *Tomkins v. Bennett* (*Salk.* 22.) for in that case there was *Contract not par delictum.* *Ib.*

(*v.* this case in *Contract.*)

152. Action for money had and received does not lie to recover back money paid for the release of cattle distrained damage feasant, though the distress were wrongful.

Money paid for release of cattle.

Lindon v. Hooper. 414

Cowper.

Per Lord Mansfield. The plaintiff may be allowed to wave the trespass, and bring an action for money had and received, in such instances where the relief is more favourable to the defendant and where he eases the defendant of *special pleading* and takes the risque of being surprised upon himself; but in this case he eases himself of the difficulty and precision of special pleading and the burthen of proof consequent thereon and exposes the defendant to uncertainty and surprise. *Lindon v. Hooper.* Page 419

Waiver of
tort.

153. But in case of goods taken in execution and sold under a warrant of distress, under a conviction if the conviction is quashed, and consequently there could be no justification, the owner may waive the *tort* and bring an action for money had and received.

Feltham v. Terry. cited *Ib.* 419

For in this case the plaintiff by bringing his action for money had and received, could only recover the money for which the goods were sold, but if trespass had been brought the defendant must have pleaded specially, and the plaintiff might have recovered damages far beyond the money actually received from the sale of the goods. *Ib.*

Goods in execution.

154. So when goods are taken in execution which are not the property of the person against whom the execution issued. *Ib.* 419

Not proper
to try warranty.

155. An action for *money had and received* (with no other count) is *not a proper* action to try a *warranty*.

Power v. Wells. 818

In this case (*Power v. Wells*) money and a horse were given in exchange for another warranted sound which was unsound at the time.

(Vide *Stuart v. Walkins, Douglas* 18. and note the difference between count for money had and received only, and an action of *assumpsit* to try the warranty. *Ib.*

Douglas.

Judgments
of foreign
courts.

156. *Indebitatus assumpsit* will lie on the judgment of a foreign court without declaring upon or proving the grounds and cause of action on which the judgment went.

Walker v. Witter. 1

In *indebitatus assumpsit* on a foreign judgment the judgment is shewn as a consideration. *Ib.*

157. *Per*

Douglas.

157. *Per Buller, J.* All the old cases shew that wherever *indebitatus assumpsit* is maintainable, debt also is. *Ib.* *Indebitatus assumpsit, debt.*
(See 2 *Burrows* 1008.)

'Till *Slade's* case a notion prevailed that on a single contract for a sum certain, the action must be debt; but it was held in that case that the plaintiff had his election either to bring *assumpsit* or debt. *Ib.*

158. *Assumpsit* for the value of a horse warranted sound which proved unsound, is a proper form of action although there has been an *express warranty*, for promises may be either executed or executory—the distinction is, that in one you may traverse the consideration, in the other not. *Express warranty.*
Stuart v. Wilkins. 18 to 21

159. It lies although the warranty is of something past or then existing—a warranty extends to all the faults known or unknown to the seller, selling for a sound price without warranty may be a ground for an *assumpsit*, but in such case it ought to be laid that defendant knew of the unsoundness. *Warranty of something past.*
Ib.

160. (a) *Assumpsit* for money had and received will not lie when money has been paid on a contract which the other party contends to be still open. *Contract open.*
Westen v. Downes. 23, 24. & n.

Per Lord Mansfield. Where there is a special contract, the defendant ought to have notice that he is sued on that contract. *Ib.*

160. (b) The plaintiff had purchased a pair of horses for seventy guineas from the defendant, which he undertook to take back if returned within a month, the plaintiff returned the first pair within the month but took a second pair, these he also returned and took a third, which he offered to return; but the defendant refusing to take them, he brought his action for money had and received, and it was held not to lie, the contract being still open. *Ib.*

Per Buller J. The defendant has not precluded himself from entering into the nature of the contract by taking back the last pair of horses—where the contract is open it must be stated specially. *Ib.*

161. *Indebitatus*

Douglas.

Order under
act of parlia-
ment.

161. *Indebitatus assumpsit* lies upon an order to pay money under the authority of an act of parliament.

The King v. Toms, Page 387

Goods en-
trusted for sale.

162 *Assumpsit* for money had and received will lie if A, having obtained possession of goods (lottery tickets) entrusted to B by C, to be sold at a fixed price, and at the time when the goods are to be re-delivered or the price accounted for, refuses either to return them to B, or to pay the fixed price, and B being threatened with an action by C, pays him the price, for A shall be presumed to have sold the goods.

Longchamp v. Kenny. 132.

Notice of
nature of de-
mand.

163. But in such a case the plaintiff must have given the defendant notice of the nature of his demand because a party shall not be permitted to avail himself of the generality of a declaration for money had and received to surprize the defendant.

Ib. 133

164. *Qa.* If *Assumpsit* for money laid out and expended would lie in the above case.

Ib. 134.

Where the demand is for a specific thing an action cannot be maintained in this form.

Ib.

For dividend
under commis-
sion.

165. *Assumpsit* will lie against the assignees of a *Bankrupt* for a creditor's share under an order of the commissioners for a dividend.

Brown and another v. Bullen. 394.

Id.

In such action the proceedings before the commissioners are conclusive evidence of the debt—and the assignees cannot set off a debt due from the plaintiff.

Ib.

Special agree-
ment, general
counts.

166. If the declaration contain a count on a special agreement and also general counts, though the plaintiff fail in proving the special agreement he may go into evidence on the general counts.

Payne v. Bacomb, 628.

Insurance.

167. In *Assumpsit* on a policy of insurance as for a total loss an average loss may be recovered.

(*Ib.* in Note.) 704.

Salary of
curate.

168. If the title for holy orders is an appointment to be curate of the rector's church 'till otherwise provided for by some ecclesiastical preferment, or for fault by him committed, lawfully

lawfully removed. The party cannot be removed without cause while the grantor remains rector of that parish.

Martyn v. Hind. Page 137

169. And he may bring *assumpsit* against the rector for the salary. *Id.* *ib.*

170. But if the rector is *bona fide* preferred to another living the obligation ceases. *Id.* *ib.* 142

171. Plaintiff's brother was a bankrupt, and she was induced by an agent for defendant, who was a principal creditor, to pay him 40*l.* to sign the certificate.—*Per Lord Mansfield*, it was iniquitous and illegal to *take* and therefore to *detain* this 40*l.* if a man makes use of his power to extort money from one in distress, it is certainly illegal and oppressive, and whether it was the bankrupt or his sister that paid the money, it is the same thing.—Verdict for the plaintiff in action for money had and received. Extortion.

Smith v. Bromley. 671

Per Lord Mansfield.—The reason given in *Smith v. Bromley*, 1 *Salk.* pl. 2. is absurd, *solenti non fit injuria*—if the act is in itself immoral, or a violation of the general laws of public policy, there the party paying, shall not have an action for so much money received; for where both parties are equally criminal against such general laws, the rule is *potior est conditio defendentis*, but there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit, &c. if such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover; and it is astonishing that the reports do not distinguish between the violation of the one sort and the other.

(*v. Skin.* 411. Pl. 7. *Skin.* 412. 6 *Mod.* 161. *Comb.* 447. 2 *D. & E.* 763. 3 *D. & E.* 17. 1 *Hen. Bl.* 65.)

1 *Durnford and East.*

172. Where two parishes had been a long time united, and had had a joint sexton who was paid by both, and afterwards one of them claimed a right of electing a separate sexton, of which they had given notice to the other, that other parish cannot maintain an action for money paid, laid out, and expended to the use of the first parish for their *quota* of the sexton's salary. Sexton's salary.

Stokes and others v. Lewis and another. 20

173. Neither

Right of
sexton.

Durnford and East.

173. Neither can the right of the sexton be tried in such case, without his being a party to it.

Stokes and others v. Lewis and another. Page 22

Payment of
salary joint.

174. Neither is the payment of the salary a joint obligation on the two parishes, for the sexton in such case cannot bring his action against one of the parishes for the whole sum. *Ib.*

Payment
against consent.

175. *Assumpsit* for money paid, laid out and expended, will not lie where the money has been paid against the express consent of the party, for whose use it is supposed to have been paid. *Ib.* 21

Payment un-
der counterfeit
authority.

176. If A. be indebted to B. and pay such debt to the attorney of a person suing A. in B's. name, but without his authority B. may notwithstanding recover in an action for money had and received against A. whose remedy is against the attorney, who trusted to the counterfeited warrant of attorney as from B. although he conceived that he was acting under a real authority.

Robson v. Eaton. 59

177. The defendant in this case being really indebted to the plaintiff, one *Davis* forged a power of attorney, and empowered an attorney of the name of *Hodgson*, to bring an action in the name of the plaintiff against the defendant, the action was brought in the court of common pleas, and the defendant paid the money into court, which *Hodgson* took out and paid it over to *Davis*, who then absconded. *Ib.*

Account stat-
ed.

178. The nature of an account stated is this; the parties meet, discuss their several claims, and strike a balance, at which time either party is at liberty to destroy the vouchers, &c. and after that the balance is never to be disputed—it is an agreement by all the parties, that all the parts are true.

Trueman v. Hurst. 38

(*v. B. N. P.* 129.)

Id.

179. This was formerly very conclusive, but of late a greater latitude has prevailed, in order to remedy the errors which may have crept into the account in surcharging the items.

Trueman v. Hurst. *Ib.*

This was an action of *assumpsit*, the first count was on a promissory note given by defendant for board and lodging, &c.

&c. another on an account stated, &c. Plea infancy, replication, necessities, general demurrer.
(v. Infant.)

180. On *indebitatus assumpsit*, an account current cannot be given in evidence, because the examination of the items would be too tedious. *Gibb E. 189*)

Account current.

(Plaintiff may now recover part of the sum demanded on an account stated, as well as on any other. *Bull. N. P. 129.*—If it appear, that parties came to an account, and that a balance was struck, and no count for *in simul comp.* plaintiff will be nonsuited. *B. N. P. 129.*)

181. A wager between two voters, with respect to the event of an election of a member to serve in parliament, laid before the poll began is illegal.

Wager, event of election.

Allen v. Hearn. 56

182. *Quere*, whether a wager, that war would be declared against France, within three months is void.

Wager, declaration of war.

Foster v. Thackery.

Trin. 21 Geo. 3. B. R. cited in Allen v. Hearn. 57

183. A wager upon the event of a cause in the house of lords, or the courts of justice is void, if laid with a lord of parliament, or a judge.

Wager, event of suit.

Allen v. Hearn. 57

184. *Assumpsit* for money had and received, lies where a payment has been made on a contract, which is put an end to.

Contract open, or put an end to.

Towers v. Barrett. 133

185. As where the plaintiff purchased from the defendant a one horse chair, for which he paid ten guineas, and it was agreed at the time of the sale, that if it did not please the wife of the plaintiff he should be at liberty within three days to return it, paying 3s. 6d. *per day* for the hire, within the three days he did return it, and then brought his action for the ten guineas, resolved, that the sale being conditional, he had rescinded the contract by returning the chaise, and that he might recover the sum he had at first advanced.

Id.

186. But

Contract
open.

v. Durnford and East.

186. But if the contract continue open, the plaintiff can only recover damages for the breach of it, and then he must state the special contract.

Towers v. Barrett. Page 133

Difference

187. The difference between those cases where the contract is open, and where it is not so, is this, if the contract be rescinded as where by the terms of it, it is left in the plaintiff's power to rescind it by any act, and he does it, or where the defendant afterwards assents to its being rescinded, or where no act remains to be done by the defendant himself, or by a subsequent assent by the defendant, the plaintiff is entitled to recover back his whole money, and then an action for money had and received will lie, but if the contract be open, the plaintiff's demand is not for the whole sum, but for damages arising out of it, and then he must state the special contract. *Ib.*

Fraction of
day.

188. Plaintiff declared on several promises, the breach was assigned on the 6th of November, and the declaration was of the same day (the first day of the term) is to be reckoned from the time the court began to sit, and so the breach might precede it.

Pugh v. Robinson. 116

(*V. Strange 21*)

Inferior court,
jurisdiction.

189. In an inferior court, the declaration must allege, that the money was *had and received* within the jurisdiction, as well as that the defendant *promised to pay* within it.

Trevor v. Wall. 151

Recover back
money consci-
entiously paid.

190. Where a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought to pay, he cannot recover it back again in an action for money had and received.

Bize v. Dickson. 286

Barred by the
statute of limi-
tations.

191. Neither can he recover back a sum paid for a debt, which would otherwise have been barred by the statute of limitations, or a debt contracted during his infancy. *Ib.*

Payment un-
der mistake.

192. But where money has been paid under a mistake, which there was no ground in conscience to claim, the party may recover it back again in an action for money had and received to his use. *Ib.*

Id.

193. In this case a bankrupt had under-written a policy to a brother acting under a commission *del credere*, and a loss

loss upon the policy happens before, but is not adjusted till after the bankruptcy, the brother may deduct the amount of the loss from the debt which he owes to the estate of the bankrupt, and if by mistake he pays all that is due to the assignees, without deducting such money, he may recover it from the assignees, as money had and received to his use.

Bize v. Dickson. Page 286

(*Assumpsit* for money had and received, or paid, is virtually a bill in chancery for a specific execution. 2 *Powell* on Contracts 4.)

Money had and received, bill in equity.

194. *Assumpsit* for money had and received, lies against an overseer of the poor to recover money in his hands which had been levied on a conviction, which was afterwards quashed, for the plaintiff may waive the tort, and go for the clear money really due.

Overseer of the poor.

Feltham v. Terry. E. 13 G. 3. cited in *Birch v. Wright.*

387

195. Money had and received, does not lie by the nominee of a perpetual curacy for the profits therein, till he has had the bishop's licence, because, until that he is not in possession.

Nominee of perpetual curacy.

Powell v. Milbank. M. 12 Geo. 3. B. R. 399

196. It does not lie by the nominee of a donative before the bishop's licence against a person who receives the rents and profits.

Id.

The King v. Bishop of Chester. 403

197. Where a donative had been twice augmented, it should seem, the nominee cannot maintain such action without the bishop's licence.

Id.

Ib. 404

198. An agreement between the lessor and the assignee of the original lessee, "that the lessee should have all the premises as mentioned in the lease, and should pay a particular sum, over and above the rent annually, towards the goodwill already paid by such assignee," operates as a surrender of the whole term, and the sum reserved for goodwill, is to be paid annually in gross, and not as rent, and the assignee cannot distrain either for that, or for the original rent, but he has a remedy by *assumpsit* for the sum reserved for the goodwill.

Sum in gross.

Smith v. Mapleback. 441

199. A general

Fortolls.

1 *Durnford and East.*

199. A general *indebitatus assumpsit* will lie for tolls.

Seward v. Baker. Page 616.

Per Buller, J.—There is no doubt, an actual promise would maintain this action, then if so, an implied one will likewise maintain it. 618

Bye-law, assessments.

200. (*Indebitatus assumpsit* lies for penalty forfeited by a bye-law of a company for not serving an office. 2 *Lev.* 252. So where a power is given by law to make assessments on the subject. *V. Buller N. P.* 129.)

Consideration of annuity.

201. The consideration of an annuity being partly a debt, antecedently due for goods sold, and the residue thereof, money paid at the time of granting it, the grantee may recover back in an action for money had and received, the whole consideration, if the annuity be set aside for informality in registering the memorial.

Shove v. Webb. 732

Consideration not performed.

202. (Plaintiff paid money to defendant, on his promise to make plaintiff a lease of land, and before the lease was made defendant was evicted, plaintiff recovered in *assumpsit*, the consideration not having being performed. *Palmer* 364 *Briggs Case*—& 2d *Durnford and East.* 366.)

2 *Durnford and East*

Warranty.

203. If a horse sold at a publick auction be warranted sound and six years old, and if it be one of the conditions of sale, that he shall be deemed *sound* unless returned in two days; this condition applies only to the warranty of *soundness*.

Buchanan v. Parnsbaw. 745.

Id.

204. Therefore where a horse sold with such a warranty was discovered to be 12 years old ten days after the sale, and was then offered to the seller who refused to take him; it was holden that an action might be maintained by the buyer against the seller, and his right to recover is not affected by his having sold the horse after offering him to the defendant. *Ib.*

Per Lord Kenyon. The condition of sale must be confined in this case to the circumstance of *unsoundness*, there is good sense in making such condition at publick sales, because notwithstanding all the care that can be taken many accidents.

accidents may happen to the horse between the time of sale and the time when the horse may be returned, if no time were limited: the circumstance of the age of the horse is not open to the same difficulty.

Buchanan v. Parnshaw. Page 745

205. An agreement between a debtor and his creditors that they will accept a composition in satisfaction of their respective debts to be paid in a reasonable time, cannot be pleaded to an action of *assumpsit* brought by one of the creditors to recover his whole demand. The agreement was a *nudum pactum* in its creation unless the creditor had accepted the less sum in satisfaction; if the debtor had assigned over all his effects to a trustee in order to make an equal distribution amongst all his creditors, that would have been a good consideration in law for the promise

Agreement to accept less sum.

Heathcote v. Crookshanks. 24

Per Ashburnst, J.—A promise to forgive a certain sum part of a debt, is like a promise to give that sum; but such a promise is a *nudum pactum*, for want of a consideration, and therefore is not binding, unless it be executed—that is, not obligatory without acceptance—a tender is not in all cases equivalent to payment; if it be pleaded in bar of a promise, it is taken as a payment, but as a bar to the action—as the plaintiff refused to take less in this case than the whole demand, this plea is clearly bad. *Ib.*

206. A promise in these words “if you do not know him you know me, and I will see you paid.” Not being in writing is void by the statutes of frauds.

Collateral undertaking.

Matson v. Wharam. 80

Ib.

207. So is this “you must supply my mother-in-law with bread and I will see you paid.”

Jones v. Cooper there cited, and also in *Cowper*. 227

208. The defendant *Wharam* applied to the plaintiff to serve one *Coulthard* of *Pomfret* with groceries, the plaintiff said he did not know *Coulthard*, nor any person in that part of the world; upon which the defendant replied “you know me, and I will see you paid.” The plaintiff said then he would serve him and the defendant, repeated the same words, *Coulthard* ordered goods which was sent: He was made debtor in the plaintiff's books, and they applied to him for payment, which not being paid, this action was brought against the defendant on his undertaking. *Ib.*

Ib.

209. If

2 *Durnford and East.*

209. If the person for whose use goods are furnished, be liable at all, any other promise by a third person to pay that debt, must be in writing, otherwise it is void by the statute of frauds.

Matson v. Wharam. Page 80

210. There is no distinction between a promise to pay for goods furnished for the use of another made *before* they are delivered, and one made *after*. *Ib.*

(*V. Birkmire v. Daruell.* 1 *Salk.* 27. *Williams v. Leper.* 3 *Burr.* 1886. *Read v. Nash.* 1 *Wils.* 305, *Ld. Ray.* 1085. 2 *Wils.* 94. Justice *Buller* says many of the doubts have arisen upon this statute, by making use of the word *collateral*, which is not used in the act, the proper consideration is whether it be a promise to answer for the debt of another; for if it be, though it be upon a new consideration, and therefore strictly speaking, not a *collateral* undertaking, yet it is within the statute. B. N. P. 277.)

Bond taken
as a security,
remedy by *assumpsit* lost.

211. Where a person will not rely on the promise which the law will raise, but takes a bond as a security, having chosen his own remedy, he cannot resort to an action of *assumpsit*.

Toussaint v. Martinant. 100

212. Therefore if a surety bound with his principal for payment of money by instalments, took a bond from the principal, conditioned for payment of the amount of the instalments before the first of them will become due, and before that time the principal becomes bankrupt and obtains his certificate, and afterwards the instalment bond is discharged by the surety, he cannot maintain an action against the principal for money paid to his use, for he has relied on the bond as his security, and not on the promise which the law would have raised. *Ib.*

213. *Per Buller J.*—Promises in law only exist where there is no express stipulation between the parties. *Ib.*

Person interfering with
goods of bankrupts.

214. If a trader become bankrupt by lying in prison two months after in arrest, his assignees may maintain an action for money had and received against a person who having notice that a commission would be issued against him, sold his goods and paid him the produce before the expiration of the two months.

King v. Leith. 141

(*V. 3 Wils.* 304.)

215. The

2 Darnford and East.

215. The action of *assumpsit* for money had and received, is like a bill in equity, and therefore the party must shew that he has conscience and equity on his side, so that it lies not against one who was known to be only a surety in an annuity bond for the payment of the annuity, to recover the consideration money after the annuity had been set aside, for want of a memorial, though the surety had joined in a receipt for the money; for in conscience he only who received the money ought to pay it back.

Lies not for consideration of annuity.

Straton v. Rastall. Page 370

Per Buller J.—In order to recover money in this form of action, the party must shew that he has equity and conscience on his side, and that he could recover it in a court of equity,—on strict principles of law, if a contract becomes void by the act of the plaintiff, on what ground can he recover back the money; for the neglect of a plaintiff cannot raise a debt in the defendant.

Per Ashburn J.—Differed from the court, and thought this action might be maintained, for that whenever a man has received money on a consideration which afterwards fails, that person from whom he received the money, has a right to recover it back as money had and received to his use.

Ib.

216. One partner may maintain an action for money had and received by one against the other partner, for money received to the separate use of the former, and wrongfully carried to the partnership account.

By one partner, money to the separate use.

Smith v. Barrow. 476

217. Where the money is owing to two partners, and after the death of one it is paid to a third person, the surviving partner may maintain an action for money had and received in his own right, and not as survivor.

By surviving partner in his own right.

Ib. 476

218. The same of money received after the testator's death, for which his executor may maintain this action in his own right.

So by executor.

Ib.

Per Buller.—One partner cannot recover a sum of money received by the other, unless on a balance struck that sum is found due to him alone. But this objection does not apply here.

Ib.

219. Where

Balance, partnership account. 2 *Durnford and East.*

219. Where two enter into articles of partnership for seven years, in which is a covenant to account yearly, and to adjust and make a final settlement at the expiration of the partnership, and they dissolve the partnership before the seven years are expired, and account together and strike a balance, which is in favour of the plaintiff including several items not connected with the partnership, and the defendant promises to pay it, an action of *assumpsit* lies on such express promise.

Foster v. Allanson.

Page 479

(See this case in *Parker*.)

Express promise, covenant.

220. An action of *assumpsit* may be maintained upon an *express* promise for the amount of a balance struck on a partnership account, though there was a covenant between the parties to account, and the judgment in this action might be pleaded to an action brought on the covenant.

Moravia v. Levy. *Ib.* 483 (in note)

Per Buller J.—It does not signify in this case, how the debt arose; here is an express promise to pay the balance which had been struck; and that is the ground of the action; otherwise the objection would have been good. *Ib.*

(*V. Cro. J. 6. Leon. 155. Cro. El. 242.*)

Note by creditor to execute composition void.

221. If all the creditors of an insolvent consent to accept a composition for their demands upon an assignment of his effects by a deed of trust to which they are all parties, and one of them before he executes, obtain from the insolvent a promissory note for the residue of his demand, by refusing to execute, till such note be made the note is *void* in law as a fraud on the rest of the creditors, and a subsequent promise to pay it is a promise without consideration, which will not maintain an action.

Cocksbott v. Bennett.

763

(*V. Dougl. 671.*)

Void security, promise.

222. For no subsequent promise can set up a security which is void in its creation. *Ib.*

Voidable.

223. If it be only *voidable* like a security given by an infant, it may be revived by a subsequent promise.

Ib. 766

224. But

2 *Durnford and East.*

224. But if a bankrupt or insolvent after becoming free from his engagements, voluntarily give security for a former demand which is due only in conscience, it may be enforced in a court of law.

Security by bankrupt.

Cocksbott v. Bennett.

Page 765

225. A wager respecting the amount of any branch of the publick revenue is illegal, because it leads to an improper discussion, and is contrary to sound policy.

Wager, publick revenue.

Atherfold v. Beard.

610

226. And after verdict, for the plaintiff in an action brought on such a wager, the court will arrest the judgment.

Ib.

227. Mr. Justice Buller was strongly inclined to think that the *stat. 14 Geo. 3. c. 48.* made *all wagers* void, wherein the parties had no interest.

Matter in which partners have no interest.

Ib.

3 *Durnford and East.*

228. Payment of money to an executor who has obtained probate of a forged will, is a discharge to the debtor of the intestate, notwithstanding the probate be afterwards declared null.

Payment under authority which proves void.

Allen v. Dundas.

127

Per Ashburn J.—Though there was no coercion of a suit at law, yet the party to whom the payment was made, had such an authority as could not be questioned at the time, and such as a court of law would be bound to enforce; the defendant was not obliged to wait for a suit, when he knew no defence could be made to it. This therefore cannot be called a voluntary payment.

Ib.

229. If two persons jointly engage in a stock-jobbing transaction, and incur losses, and employ a broker to pay the difference, and one of them repay the broker, with the privacy and consent of the other, the whole sum, he may recover a moiety from that other in an action for money paid to his use notwithstanding the *7 Geo. 2. c. 8.*

Petrie v. Hannay.

418

Per Ashburn J.—The transaction being only *malum prohibitum*, and not *malum in se*, and the defendant being bound in honour and conscience to repay them, the plaintiffs are entitled to recover.

Per Buller J.—In the case of an illegal transaction, if one person pay money for another *without an express authority*,

he cannot recover it back, because in the case of illegal contracts, as they are not bound to pay, one of them cannot acquire a right of action against the other by paying the whole without his consent.—In the case of legal contracts both are liable to pay. *Petrie v. Hannay.* Page 418

Per Grose J.—This action is not founded on a promise arising by implication of law out of the illegal transaction, but from an express one made subsequently, and which the defendant was under no necessity of making. *Ib.*

Lord *Kenyon* differed on the principle that those who come into a court of justice to seek redress, must come with clean hands, and must disclose a transaction warranted by law; and said he could not distinguish this case from that of a smuggling transaction, which is not *malum in se*, as contradistinguished from *malum prohibitum*. *Ib.*

230. An action for money had and received, will not lie to recover the premium of a re-assurance (void by 19 *Geo. 2. c. 37.*) after capture.

Andre v. Fletcher. 266

Wager.

231. A wager that A. had purchased a waggon of B. is not void at common law, nor prohibited by *stat. 14 Geo. 3. c. 48*; and an action may be maintained upon it.

Good v. Elliott. Tr. 30 Geo. 3. 693

232. *Per Cur. diffen. Buller J.*—An interest in the subject matter is not necessary to enable the party to maintain this action, which may be on indifferent matters concerning third persons. *Ib.*

In general legal.

233. In general a wager is legal, if it be not an incitement to a breach of the peace, or to immorality; or if it do not affect the feelings or interest of a third person, or expose him to ridicule, or libel him, or if it be not against sound policy. *Ib.*

Consideration void, bankrupt law.

234. A promise made by friend of the bankrupt when he was on his last examination, that in consideration that the assignees and commissioners would forbear to examine him touching certain sums which he was charged with having received, and not accounted for, he would pay such sums as the bankrupt had received and not accounted for, is void, as against the policy of the bankrupt laws.

Nerot v. Wallace. 17

3 *Durnford and East.*

Per Ashurst J.—In order to found a consideration for a promise, it is necessary that the party by whom the promise is made, should have the power of carrying it into effect; and secondly, that the thing to be done should in itself be legal. Now it seems to me that the consideration for this promise is void on both grounds.

Neret v. Wallace. Page 17

4 *Durnford and East.*

235. The *stat. 13 Geo. 2. c. 19. s. 2.* having prohibited horse-races for a smaller stake than 50*l.* an action to recover a wager of 5*l.* on such race cannot be supported.

Johnson v. Bann. 1

Per Cur.—The horse-race itself is prohibited by the statute, and as the race which is the subject of the wager is illegal, so also is the wager. *Ib.*

236. If a bankrupt on the eve of his bankruptcy, fraudulently deliver goods to one of his creditors, the assignees may disaffirm the contract, and recover the value of the goods in *trover*, but if they bring *assumpsit*, they affirm the contract, and then the creditor may set off his debt.

Trover by assignee, assumpsit by contract affirmed.

Smith v. Hodson. Hil. 31 Geo. 3. 211

237. A physician cannot maintain an action for his fees, for the fees of a physician are honorary and not demandable of right.

Fees, Physician.

Chorley v. Bolcot. 317

238. *Assumpsit* may be maintained to recover back money paid upon a compromise after another action has been brought for it by the defendant against the plaintiff, and an interlocutory judgment had, and a writ of enquiry executed therein, it appearing afterwards that there was no real consideration for the first payment, and it having been made ultimately under a compromise, and not under the compulsory judgment of a court.

Payment under compromise.

Cobden v. Kendrick. 432

239. If a revenue officer seize goods as forfeited, which are not liable to seizure, and take money of the owner to release them, the latter may recover back the money in an action for money had and received, in which action the month's notice under 23 *G. 3. c. 70. s. 30.* need not be given, there is no pretence to say, that this is done *colore officii*—

Money extorted, money had and received.

officiis—such notice is only necessary in trespass or tort, in order that they may have an opportunity to tender amends.

Irving v. Wilson. Mich. 32 Geo. 3. 485

4 *Durnford and East.*

Excise officer.

240. *Assumpsit* for money had and received, does not lie against an excise officer to recover duties received by him after the act imposing them is repealed, if he have paid them over to his superior, and in such case he is entitled to a month's notice before the action is brought by 23 Geo. 3. c. 70. s. 30.

Greenway v. Hurd. 32 Geo. 3. 553

Illegal contract, testator, execution.

241. The testator having borrowed money on a *respondentia* bond prohibited by law, his executors the plaintiffs refunded the money to the lender, the defendant held, that the executors could not maintain an action for money had and received, to recover back this money, notwithstanding the defendants could not have compelled them to pay it.

Munt v. Stokes. Hill. 31 Geo. 3. 561

242. *Per Buller J.*—In the case of illegal contracts, one party cannot recover against the other on the contract itself, but if he come to rescind the contract he may recover back so much money as he has paid—this was established in *Jacques v. Goliightly*, and in *Louisy v. Burdieu*, (*Doug.* 468) if the party come into a court of justice to enforce an illegal contract, two answers may be given to his demand, the one, that he must draw justice from a pure fountain, and the other, that *potior est conditio possidentis*. Such would have been the case, if the plaintiffs had not paid the money, and an action had been brought on the contract; but the plaintiffs having paid it, the question is, whether the defendants retain the money against conscience.

243. *Per Lord Kenyon.*—The ground I go on is this, that there was no misrepresentation, or any improper conduct by the defendants to extort the money from the plaintiffs, but the plaintiffs knowing the whole transaction, and the law also, as they are bound to know, voluntarily paid it; there was nothing contrary to conscience in the defendants receiving the money which they had advanced; the plaintiffs therefore are not entitled in law, or equity to recover it back again.

Ib. 564

Distress delivered, money had and received.

244. Goods distrained by the plaintiff were delivered by him to the defendant on his promising to pay the rent; held that an action for money had and received, would not lie for

for the value of the goods, though the defendant did not pay the rent.

Leery v. Goodson. E. 32 Geo. 3. Page 687

4 *Durnford and East.*

245. *Per Cur.*—In the case of *Longchamp v. Kenny, Dougl. 137.* the presumption was, that the goods (lottery tickets) were sold; here a contrary presumption arises, the goods being delivered to avoid being sold. *Ib.*

Hen. Blackstone.

246. An auctioneer employed to sell the goods of a third person by auction, may maintain *an action for goods sold and delivered* against a buyer, though the sale was at the house of such third person, and the goods were known to be his property.

Auctioneer,
goods sold and
delivered
against buyer.

Williams v. Millington. Mich. 29 Geo. 3. 81

Per Cur. An auctioneer has a possession coupled with an interest in goods which he is employed to sell, not a bare custody like a servant or shopman, the carrier and owner of goods may each have actions on a *tort*; the factor or owner may each have actions on a contract. *Ib.*

(Whatever sum is paid for earnest, or as a deposit, is to be deemed part of the price when the goods come to be paid for. 1. *Sand. 319.*)

247. Where a husband goes abroad leaving his wife in this country who dies in his absence, a third person who voluntarily pays the expences of her funeral (suitable to the rank and fortune of the husband,) though without the knowledge of the husband, may recover from him the money so laid out, especially if such third person be the father of the wife.

Expences of
funeral for wife
paid by third
person.

Jenkins v. Tucker. Mich. 29 Geo. 3. 90

Per Lord Loughborough. There was a sufficient consideration to support this action, tho' there was neither request nor assent on the part of the defendant, for the plaintiff acted in discharge of a duty which the defendant was under a strict legal necessity of performing himself, and which common decency required at his hands,—a father also seems to be the proper person to interfere. *Ib.*

248. *Quere* whether such third person can recover from the husband money which he has expended in *discharging debts* which she had contracted during the husband's absence.

Third person
pays debts of
feme.

249. *Quere*

Hen. Blackstone.

Money paid
into court, de-
murrer to evi-
dence.

249. *Quere* whether the defendant can demur to the evi-
dence after paying money into court.

Jenkins v. Tucker. Mich. 29 Geo. 3. Page 90

Collateral
promise.

250. A tradesman delivers goods to A. at the request
and on the credit of B. who says before the delivery, "*I will
be bound for the payment of the money as far as 800l. or 1000l.*"
this promise of B. not being in writing, is void by the sta-
tute of frauds if it appear that *credit was given to A. as
well as B.*

Anderson v. Hayman. Hil. 19 Geo. 3. 120

Money paid
for lottery insu-
rance.

251. Money paid for insuring tickets in the lottery may
be recovered back from the keeper of the office, in an ac-
tion for money had and received.

Jaques v. Withy and another, T. 28 Geo. 3. 65
(2 *Black. 1073. Cowp. 790, & 197.*)

Contract ille-
gal by statute,
subsequent re-
peal.

252. A contract declared by a statute to be illegal, is not
made good by a subsequent repeal of the statute. *Ib.*

Money had
and received,
mercantile tran-
saction.

A. being indebted to B. for brokerage, and B. indebted
to C. for money lent B. gives an order to A. to pay C. the
sum due from A. to B. as a security on which C. lends
B. a further sum; and the order is accepted by A. on the
refusal of A. to comply with the order, C. may maintain
an action for money had and received against him.

Israel v. Douglas. 239

(Justice *Wilson* differed from the court on the ground
that an action for money had and received, will not lie against
any man who is a debtor.—and that it will not lie unless
money has been actually had and received.)

Warranty of
horse,

253. The defendant had in the month of March, sold to
the plaintiff a mare which he warranted sound and free from
blemish; soon after the sale the plaintiff discovered that she
was unsound and vicious, but kept her for three months
after the discovery, during which time he endeavoured to
cure her, he then sold her, but she was returned as unsound,
and he kept her till the October following, when he sent
her home to the defendant who refused to take her, and
she died on the way; it was proved *that she had been unsound
at the time of the sale*, and it was resolved that this defect
subsisting *when the warranty was made*, that the action lay
though

though she was not returned nor notice given of the un-
soundness.

Fielder v. Starkin. Page 17

Hen. Blackstone.

254. Lord *Loughborough*.—No length of time elapsed after the sale will alter the nature of a contract originally false. The bargain is complete, and if it be fraudulent on the part of the seller, he will be liable to the buyer in damages without either a return or notice. *Heath J.* if this had been an action for money had and received to the plaintiff's use, an immediate return of the mare would have been necessary; but as it is brought on the express warranty, there was no necessity for a return to make the defendant liable. *Id.*

Espinasse's Cases at N. P.

255. Entries in the books of merchants, bankers, &c. can only be proved by the clerk by whom the entries have been made; nor is other evidence admissible, though such person is abroad. Entries mer-
chants books,
clerk abroad.

256. *Per Lord Kenyon*, it is the practice to admit the proof of the execution of deeds and bonds by proving the hand writing of the subscribing witness, where it appeared that he was abroad, but that is the case of a mere instrumentary witness, and cannot govern the present—The clerks of merchants may give some evidence independent of the mere entry in the books, from having some acquaintance with the dealings upon which the entries were founded.

Cooper v. Marsden. 2

257. Money lent to play with, without any security is recoverable in *assumpsit*. Money lent
to play.

Wettenhall v. Wood. 18

258. The commissioners of bankrupt may make a verbal order for the payment of his expences to a person whom they have summoned to attend them, and it shall be recoverable in *assumpsit*. Expences of
witness.

Tarker v. Botham. 64

2 *Hen. Blackstone.*

259. if a bankrupt after obtaining his certificate, promised to pay a prior debt when he is able; in a general *indebitatus* Bankrupt.

Assumpsit.

bitatus assumpsit, brought on that promise, the bankrupt plaintiff must prove the ability of the defendant to pay.

Besford v. Saunders. Page 116

2 *Hen. Blackstone.*

Wager, illegal
game.

260. No action will lie on a wager respecting the mode of playing an illegal game, and if such a cause be set down for trial, the judge at *nisi prius* will order it to be struck out of the paper.

Brown v. Leeson. 43

Attorney.

Attorney.

Hob.

1. **W** Here an attorney takes upon him to appear, the court looks no further, but takes it that the attorney had sufficient authority, and leaves the party to his action against him. Appearance binds client.

Anonymous. Page 77

2 *Strange.*

2. On an indictment for perjury in an answer in chancery, it was held that his attorney who was with the defendant when he took the oath, could not be admitted to prove the identity of the person, and the fact of his taking the oath, the attorney insisting on his privilege. Indictment for perjury in answer, proof of identity of client.

The King v. Watkinson. 1122

3. *Quere tamen*, for this was a fact in his own knowledge and no matter of secrecy committed to him by his client.

(See *Cowper*. 846.)

Id.

2 *Wilf.*

4. Action on the case lies against an attorney for neglecting to charge a party in execution who had been surrendered in discharge of his bail, altho' it seemed rather want of judgment than negligence. Negligence of.

Ruffel v. Palmer. 325

1 *Black.*

5. Payment to the plaintiff's late attorney who is changed without leave of the court will be good. Payment to attorney.

Powell and Little. H. 20 Geo. 2.

(*v. 4 Burr. 2060. Salk. 86.*) 8

3 *Burr.*

6. An attorney is not obliged to produce papers delivered to him by his client as evidence against him.

The King v. Dixon. 1687

Per Lord Mansfield. In place of producing them against his client, he ought to have immediately on receiving the subpoena delivered them up to his client. *Id.*

7. An

*Cowper.*Evidence of
collateral facts.

7. An attorney is not privileged from giving evidence of collateral facts.

Doe v. Andrews. Page 846

Proof of attestation of instrument.

8. Therefore where a defendant's attorney who was a witness to an agreement upon which the plaintiff brought his ejectment, refused to give evidence of his attestation, &c. upon being served in court with a *subpena* for that purpose, the court of B. R. out of which the record issued, granted an attachment against him; for a person attesting an instrument is bound to prove its execution, and pledges himself to give evidence of it when he is called upon. *Ibid.*

Perjury of
client in answer.

9. An attorney may be obliged to prove his client having sworn and signed an answer, upon which the latter is indicted for perjury. *Ibid.*

*Per Lord Mansf.**Dougl.*

10. After an attorney's bill has been delivered a month, and no application has been made to have it taxed by the master, the defendant will not be permitted to question the reasonableness of the items before a jury.

Williams v. Frith. 188. & *Hooper v. Till.* 189

11. (The stat. does not extend to business done in conveyancing, nor to the executor of an attorney, and it may be given in evidence on the general issue. v. *Bull. N. P.* 145.)

12. (See stat. 2 Geo. 2. 23 S. 22.—Stat. of limitations a bar. 3. *Lev.* 367.)

13. If part of an attorney's bill is for business done in court, and the rest for conveyancing or parliamentary business, the master has power to tax the whole.

Hooper v. Till. (in Note.) 189

14. But not if the whole is for conveyancing, &c. *Ib.*

15. *Per Lord Mansfield.*—The bill of an attorney cannot be taxed at the trial of an action brought upon it; nor after verdict; and if there has been account settled between the attorney and his client, the bill shall never afterwards be taxed as of course; particular cases may be pointed out, the client may by affidavit shew that the business charged was never performed, or that the charges are fraudulent, but if the business

business was really done, the delay of the defendant for more than a month in objecting to the *quantum*, is an admission that he thinks that reasonable.

Hooper v. Till. Page 189

16. A party in a cause cannot change his attorney, without leave of the court.

Macpherson v. Rorison. 206

17. An attorney has a lien on his client's deeds, and papers for his bill.

Wilkins v. Carmichael. 100, 101

18. And may obtain an order to stop his client from receiving money recovered in a suit in which he was employed for him till the money is paid.

Wells v. Hole. 226

19. *Per Lord Mansfield.*—An attorney has a lien on the money recovered by his client for his bill of costs; if the money come to his hands he may retain to the amount of his bill, he may stop it *in transitu* if he can lay hold of it; if he apply to the court they will prevent its being paid over till his demand is satisfied. I am inclined to hold, that if the attorney gave notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong.

Stop money
in transitu.

Ib.

(v. 1 Lord Raym. 738.)

1 *Durnford and East.*

20. If A. be indebted to B. and pay such debt to the attorney of a person suing A. in B's name, but without his authority, A. is notwithstanding obliged to pay B. again, who may recover it in an action for money had and received, and A's remedy is against the attorney who trusted to the counterfeited warrant of attorney from B. although he conceived that he was acting under the real authority of B.

Payment under counterfeited warrant of attorney.

Robson v. Eaton. 59

3 *Durnford and East.*

The court under circumstances will entertain a summary jurisdiction over an attorney of the court in obliging him to deliver up deeds, &c. on satisfaction of his lien, though they came into his hands as steward of a court, and receiver of rents.

Hughes v. Mayre. 275

But

3 *Durnford and East.*

But if it appear that a third person is interested in the deeds, the court will take a security from the person to whom they are delivered, to produce them on demand for the inspection of such third person.

Hughes v. Mayre. Page 275

An attorney when plaintiff may lay the venue in *Middlesex*, but when defendant he has no privilege to change the venue to *Middlesex*.

Teardly v. Roe. 573

4 *Durnford and East.*

21. Though the court will not interfere on behalf of an attorney, and prevent the plaintiff's settling his own cause, without first paying the attorney's bill, yet when the adverse party against whom a judgment has been obtained, applies to get rid of that judgment, the court will take care that the attorney's bill is satisfied.

Compromise,
payment of bill
of costs.

Mitchell v. Oldfield, H. 31 Geo. 3. 123

Set off, bill
of costs.

22. Therefore where A. recovered against C. and C. recovered against A. and B. the court would not suffer C. to set off the damages which he had recovered against those obtained by A. unless C. would undertake that the bill of A's attorney in the first action should be satisfied, he having a lien on the judgment for his costs. *Id.*

Business at
quarter sessions,
bill taxed.

23. The court will refer an attorney's bill to be taxed, though all the business be done at the quarter sessions.

Ex parte Williams, Mich. 32 Geo. 3. 496

Name indorsed
on writ.

24. When an attorney sues by attachment of privilege, his name need not be indorsed on the writ; for the 2 Geo. 2. c. 23. § 22. which requires the name of the plaintiff's attorney to be indorsed on the writ, only extends to cases where the attorney sues for another person.

Fields One, &c. v. Lewin. E. 31 Geo. 3. 275

Proof of act-
ing as attorney
sufficient.

25. In an action by an attorney for words spoken of him in his profession, he need not prove that he is an attorney by his admission, or by a copy of the roll of attorneys; proof that he acted as such, is sufficient.

Berryman, one, &c. v. Wise, Trin. 31 Geo. 3. 366

26. Wherever at law the party calls upon his own attorney for a witness, the other side may cross-examine him, but that must be relative only to the same matter, and not as to the other points of the case.

(524)

27. An

4. *Durnford and East.*

27. An attorney is not restrained by any rule of law from giving evidence of a conversation between him and his client, touching the justice of his suit, after the purpose of the suit has been obtained; for the communication could not be said to have been made by way of instruction for conducting his cause.—*Per Cur.* The difference is whether the communications were made by the client to his attorney in confidence, as instruction for conducting his cause, or a mere *gratis dictum*; the former was not the case here, on the contrary, the purpose in view had been already obtained.

Confidential communication instructions.

Cobden v. Kendrick. Page 438

If any matter be disclosed to an attorney in the cause pending the cause, he is not permitted to give it in evidence either in that, or in any other action.

Wilson v. Rastall. 753

It is the privilege of the client, and not of the attorney.
Ib.

28. *Per Buller J.*—This privilege is confined to the three cases of counsel, solicitor, and attorney, and to communications in one of these three characters, the nature of this privilege is that the attorney shall not be permitted to disclose in any action, that which has been confidentially communicated to him as an attorney; it is the privilege of the client;—but if he be employed as a steward, or consulted as a friend, the privilege does not extend in this case, the witness could not be his attorney, for he acted as under-sheriff; there are cases to which it is much to be lamented that the law of privilege is not extended, those in which medical persons are obliged to disclose the information which they acquire by attending in the professional characters. *v. Dutchess of Kingston's case.* 11 *State Trials.*

Nature of the privilege.

Wilson v. Rastall. 759

H. *Blackstone.*

29. The attorney had delivered his bill in due time to the defendant who acknowledged the debt, and said he would pay it, but that he did not know what to do with the bill, upon which the plaintiff (the attorney) took it back again, and at the end of the month brought his action on it, he was non-suited, the judge being of opinion that the bill ought to be left with the defendant, it being the intention of the statute 2 Geo. 2. c. 23. that the client should have time to examine the charges and take advice on them, if necessary.

Bill of costs left with client.

Brooks v. Masan. 290

30. The

H. Blackstone.

30. The lien which an attorney has on the costs, is subject to the equitable claims of the parties in the cause.

Schoole v. Noble, and others. Trin. 28 Geo. 3. Page 23

31. An attorney has a lien for his bill on money levied by the sheriff under an execution on a judgment recovered by his client, and is intitled to have it paid over to him, notwithstanding the sheriff has notice to retain the money in his hands, and that the court would be moved to set aside the judgment, and notwithstanding a docket has been struck against the client becoming a bankrupt.

Griffin v. Eyles. H. 29 Geo. 3. 122

32. After verdict the court will not compel an attorney to discover the place of abode of his client.

Hooper v. Harcourt. Mich. 31 Geo. 3. 534

Vernon and Scriv.

33. A client indebted to his attorney, cannot oblige him to produce his papers, &c. in court, though only for the purpose of using them there, and not to take them out of the attorney's possession. 174

34. Declaration on a bond given to an attorney for an untaxed bill of costs, to make him give up papers, &c. is refused to be set aside, but the bill is ordered to be taxed, and the bond to stand a security for the taxed bill. 239

Power of attorney.

35. When one person subscribes a policy with the name of another; proof of his having done it in many instances, is sufficient to charge him whose name is so subscribed, without producing any power of attorney.

Neal v. Erving. 61

Award.

Award.

Salkeld.

1. **W**HERE an award creates a new duty, the old is extinguished thereby.

Freeman v. Bernard. Page 69

2. But if it only ordains a release to discharge the old duty, 'tis otherwise. *Ib.*

3. An award may be good, though no time appointed for performance. *Per Holt*; for the law supplies the time. *Ib.*

4. For whether it be to be on request or tender or not, the law says it shall be in convenient time. *Ib.*

5. An award that the party or his executors shall release, &c. is good, for either may be sued for non-performance. *Ib.*

6. An award that a suit in chancery shall be dismissed, is good.

Knight v. Burton. 75

7. An award may be good in part, and void in part. *Ib.*

8. An award to make general releases of all demands to the time of the award is good, for so much as goes to the time of the submission, and void for the residue. *Ib.*

9. An award to pay the costs of such a suit is uncertain, *contra*, if to pay such costs as the master shall tax.

Winter v. Gartrick. 75

10. An award that A. shall beg B's pardon, in such manner and place as B. shall appoint, is void.

Glover v. Barrie. 75

11. Quere, if an award of money to be paid to a third person be good, unless it appear to be for the benefit of one of the parties.

Bird v. Bird. 74

12. An

Salkeld.

12. An award of a collateral thing in satisfaction, held a good plea, without shewing performance.

Parflet v. Baily.

Page 76

13. Money paid on a void award, may be pleaded or taken as accord, with satisfaction.

Bacon v. Dubarry. 71

14. An award pleaded as made *de et super premissis*, is not enough, unless it appear to be so in *se*. *Ib.* 70

15. A patrol award may be pleaded, ready to be delivered, &c.

Oates v. Bromil. 75

16. If an award be pleaded without date, it must be computed from the delivery.

Armist v. Breame. 76

17. A submission by A. as attorney for B. concerning accounts *inter* B. and C. good to bind A. but not B.

Bacon v. Dubarry. 70

18. A submission to an award made a rule of court, though the consent was only conditional.

Baily v. Chestley. 72

19. An award made under a rule of court is *quasi* part of the rule.

Anonymous. 71

20. And on breach of such award, the party may proceed both by action and attachment at the same time.

Anonymous. 73, 83

21. Service of a *subpoena*, held a breach of a rule of reference made at *nisi prius*, and attachment granted. *Ib.* 73

22. An award made by rule of court, shall not be set aside, unless there was practice with the arbitrators.

Anonymous. 71

23. Appointment of an umpire by arbitrators, before the time expires for making their award, is void.

Reynolds v. Gray. 70

24. Yet

Salkeld.

24. Yet fee where an umpirage may be made, before such time is expired or not.

Mitchell v. Harris. Page 72

25. In what cases such appointment of an umpire is revocable or not.

Reynolds v. Gray. 70

26. On a reference to three foremen of the jury, the regularity of their proceedings examined into.

Morris v. Reynolds. 73, 84

27. In debt on bond to perform an award, omission in the re-publication of a void part of the award, is no variance. *Aliter* if not void.

Foreland v. Marygold. 72

1 Lord *Raymond.*

28. An award made shall be intended ready to be delivered, unless the contrary be shewn.

Marks v. Marriot. 115, 247, 533

29. Breach of an arbitration bond, may be assigned, in not delivering the possession of a house. *Ib.* 115

30. Award of releases good, as to all matters submitted, and void as to others. *Ib.* 116

31. To pay money to a stranger is ill, unless in discharge of a debt, owing by the other party.

Bedam v. Clerkson. 123

32. Arbitrators chuse an umpire (not conditionally) they have executed their power, and they cannot chuse another if he refuse.

Reynolds v. Gray. 222

33. Award of a release to a man who has submitted on behalf of another, is good, because it shall be intended for the benefit of the party on whose behalf, unless the contrary appears.

Bacon v. Dubarry. 246

34. Award of payment of money *de et super pramissis*, reciprocal and good. *Ib.* 247

1 Lord *Raymond*.

35. An award that does not appear to be reciprocal, cannot be made good by an averment that it was made *de et super premissis*.

Bacon v. Dubarry. Page 247

36. Executors are bound by their testators submission to an award.

Freeman v. Bernard. 248

37. Award that the party, his executors, &c. shall release is good. *lb.*

38. An award may be pleaded in bar without performance. *lb.*

39. An award of mutual releases does not discharge an action, till it is performed. *lb.* 248, 612

40. An award that one party shall accept without awarding the other to perform is no bar.

Clapcott v. Davy. 612

41. Award that the party shall fetch his mare and colt, implies an award of a delivery. *lb.*

2 Lord *Raymond*.

42. Award that one party shall pay to the other fifty pounds, and that the other thereupon shall seal a release to him of all actions *tangen. premissa* is good, the *premissa* referring to the controversies submitted.

Anonymous. 898

43. Money awarded in full of all demands, shall be restrained to the time of submission. *lb.*

44. An award to pay money in satisfaction, may be pleaded in bar.

Squire v. Grevett. 965

45. Not necessary to aver of an award made in writing, that it was ready to be delivered.

Anonymous. 989

46. An award to provide two pullets, &c. may be pleaded in bar, because the submission implies a promise to permit it.

Purflow v. Baily. 1039

47. An

2 Lord *Raymond*.

47. An award that deals erected on the defendants ground, to the nuisance of the plaintiff, shall be taken down, implies that the defendant shall take them down.

Armit v. Breame. Page 1076

48. An award without date, to do an act within fifty days after the date, must be performed within fifty days after the delivery. *Ib.* 1076

49. A parol award to be favourably expounded.

Bell v. Gips. 1142

50. A release to a day before the submission, may be awarded, and it shall not be intended that any controversies have arisen since. *Ib.*

Strange.

51. Arbitrators award a party to pay costs, the master shall tax them.

Dudley v. Nettlefold. 737

52. Award that A. shall execute a covenant to indemnify B. is good.

Philips v. Knightley. 903

53. In debt on an award, a mutual submission must be shewn.

Dilley v. Polhill. 923

54. Award to give security for an annuity, not saying what security, uncertain.

Tipping v. Smith. 1024

55. Award to pay costs, to be taxed by one not an officer for that purpose, is ill.

Knott v. Long. 1025

56. Awarding the giving a note, is the same as awarding payment at a future day.

Booth v. Garnet. 1082

57. A demand as executrix, is within a general submission to an award.

Elletson v. Cummins. 1144

58. An award cannot be complained of, till the submission is made a rule of court.

Harrison v. Grundy. 1178

Hard.

59. Arbitrators may give costs, and settle what they shall be, without referring it to the officer.

Shephard v. Brand. Page 48

60. See how far they can delegate their power of taxing costs.

Nott v. Long. 173

61. See the doctrine of awards, and how far they can delegate their power.

Ib. 172

62. An award shall not be set aside, because the arbitrators mistake the law; but if part of the evidence is concealed, it is a good reason to set it aside.

Metcalf v. Ives. 373

2 *Wilson.*

63. Debt upon an arbitration bond, defendant pleads no award, plaintiff replies and shews and award to pay sixteen pounds ten shillings, and costs, &c. and assigns a breach for non-payment of the sixteen pounds ten shillings only, and good.

Fox v. Smith. 267

64. An award may be good in part, though bad in part.

Ib. 267

1 *Blackstone.*

65. If arbitrators join with an umpire, in his deed of umpirage, it is only surplusage, and the deed is good.

Soulby v. Hodgson. 4 Geo. 3. 463

66. If two partners refer all matters in difference between them, the arbitrator may dissolve the partnership.

Green v. Waring. T. 4 Geo. 3. 475

2 *Blackstone.*

67. On a reference of all matters in difference in this cause, if the arbitrators award general releases, the award is good, as to the matters referred, but void as to the residue.

Pickering v. Watson. M. 17 Geo. 3. 1117

1 *Burrow.*

68. Awards are now considered with greater latitude and less strictness than formerly, and 'tis right that they should be construed literally and favourably, and not scanned with critical nicety.

Hawkins v. Colclough. 277

69. Yet

1 *Burrow.*

69. Yet they must be certain and final, that is, certain to a common intent, and consistent with probable presumption, and sufficiently in effect mutual and final.

Hawkins v. Colclough. Page 277, 278

2 *Burrow.*

70. The act of 9th and 10th *Wil.* 3. c. 15. for determining differences by arbitration, was made to put submissions where no cause was depending, upon the same foot with those where there was a cause depending, and it is only declaratory, of what the law was before, in the latter case.

Lucas v. Wilson. 701

2 *Durnford and East.*

71. A submission to an award between A. and B. the parties on the record having been made a rule of court, which award not having been made in time, the dispute had been referred to a second arbitration, to settle by B. and C. who were the real parties in the suit, no attachment can issue against B. for not obeying the award made by the second arbitrator, because the reference should be made by the parties on the record, and even if it had, there should have been another rule, to make the second submission a rule of court.

Owen v. Hurd. 643

72. And as the court had no jurisdiction in this case, they could not go into the merits, though B. consented to waive the objection. *Ib.*

73. An arbitrator may award costs, without any express authority for that purpose.

Rec v. Doe. 644

74. Arbitrators having power to choose an umpire, may elect one, before they enter upon the examination of the matter referred to them. *Ib.*

75. A submission to arbitration of all matters in difference between the parties in the suit, is not confined to the subject matter in the particular action depending, but will extend to cross demands between the parties, though not pleaded by way of set off, and the costs being to elude the event, makes no difference.

Macolm v. Fullarton. 645

76. But

2 *Durnford and East.*

76. But a reference of all matters in dispute, in the cause between the parties, is confined solely to the matter in dispute in that suit.

Macolm v. Fullarton. Page 645

77. A motion that an award should be referred back to the same arbitrator, to re-consider it on the ground that he had not sufficient materials before him, when he made it, must be made before the last day of the next term, after such award made, according to the 9th and 10th Will. 3. c. 15. s. 2. although the arbitrator be not charged with corruption or undue influence.

Zackary v. Shepherd. 781

3 *Durnford and East.*

78. Hereafter it is recommended that where the parties intend to refer all disputes, the terms of the reference be "of all matters in difference between the parties;" and when the references only intended to be of the matter in the particular cause, it be "of all matters in difference in the cause."

Smith v. Muller. E. 30 Geo. 3. 626

4 *Durnford and East.*

79. An award made upon a reference of all matters in difference between the parties, does not preclude the plaintiff from suing upon a cause of action, subsisting against the defendant at the time of the reference, upon proof that the subject matter of such action was not laid before the arbitrators, nor included in the matters referred.

Ravee v. Farmer.—Hil. 31 Geo. 3. 146

80. The court will not set aside the award of an umpire, because he received the evidence from the arbitrators, without examining the witnesses, unless he were requested to examine them before the making of his award.

Hall v. Lawrence. E. 32. Geo. 3. 589

Bailiff.

Holt.

1. **A** GENERAL authority will not serve a bailiff, where a new right attached after the authority given.

Dixon v. Smalley. Page 77

2. Bailiff or not bailiff, is not traversable on avowry for rent.

————— *v. Goudier.* 256

Salkeld.

3. A corporation aggregate, may appoint a bailiff to distrain without deed.

Anonymous. 191

In replevin, if the defendant makes conusance, or justifies as bailiff to I. S. a traverse of the command of I. S. is sufficient.

Trevilian v. Pyne, 107

4. So in trespass for taking cattle or goods, for in those cases tho' I. S. may have a right to take the cattle, &c. yet a stranger cannot justify the taking, but by his command, &c. *Ib.*

5. But *aliter* in trespass *quare clausum fregit*, for there though the defendant justifies as bailiff, or by command of I. S. the plaintiff shall not traverse the command, because it would admit the truth of all the rest of the plea, *Ib.*

6. In trespass on a justification as bailiff to a court leet, for levying an amercement, some estreat of the court, or warrant of the steward, must be shewn.

Mathews v. Carew. *Ib.*

7. Note in replevin, the bailiff is an actor, and shall recover upon the merits. *Ib.* 108

8. But in trespass, the bailiff is only to excuse the wrong, and recovers nothing. *Ib.*

9. The

2 Durnford and East.

9. The bailiff of a liberty who has the return and execution of writs, is liable to an action of debt for an escape, if he remove a prisoner taken in execution to the county gaol, situate out of the liberty, and there deliver him to the custody of the sheriff.

Boothman v. the Earl of Surrey. Page 5

10. A bailiff who has arrested a prisoner on *mesne process*, may re-take him before the return of the writ, though he voluntarily permitted the prisoner to escape immediately after the arrest.

Atkinson v. Matteson. 172

Bailment.

Holt.

1. **WHETHER** the pawnee shall answer for the goods if he be robbed—he shall not be answerable if the pawn is laid up and he is robbed—otherwise if he be robbed in using or wearing it.

Anonymous. Page 569

2. Whether the pawnee hath any, and what property in the goods pawned. He cannot use the thing if it will be worse for wearing. *Ib.*

1 *Lord Raymond.*

3. A pawn is not redeemable, after the death of the pawnor.

Kinsey v. Hayward. 438

4. On a general bailment, the bailee is only chargeable to keep the goods as his own,

Lane v. Cotton. 655

2 *Lord Raymond.*

5. Six several species of bailment, *depositum, commodatum, locatio, vadium.* Pawns to be carried with reward—without reward.

Coggs v. Bernard. 912

6. A man is not answerable for a deposit, without a gross neglect. *Ib.* 913

7. In what cases a man shall be answerable for a thing lent to use. *Ib.* 915

8. Under what circumstances a pawn may be used. *Ib.* 917

Strange.

9. Delivery to the use of a creditor, vests the property before agreement, if he does not disagree after.

Atkin v. Barwick. 165

10. A parol gift without some act of delivery, will not alter the property.

Smith v. Smith. 955

11. On

Bailment.*Strange.*

11. On a bare leaving a thing in another's custody, the law raises a promise not grossly to neglect or abuse it.

Mytton v. Cock. Page 1099

12. A factor cannot pawn.

Paterfon v. Tash. 1178

13. Bailee for safe custody cannot pawn.

Hartop v. Hoare. 1187

14. Where goods are sold by a factor at his own risque, the vendee held not answerable to the owner.

Scrimshire v. Alderton. 1182

Bankrupt.

Bankrupt.

1 Lord *Raymond*.

1. **A**N inn-keeper cannot be a bankrupt, who sells only to his guests.

Meggot v. Mills. Page 287

2. For what debts a man having left off trade, may be a bankrupt. *Ib.*

3. An infant is not liable to the statutes of bankrupts.

Rex v. Cole. 443

4. Bankruptcy in the plaintiff, is no plea without a commission, &c.

Harvey v. Williams. 496
12. *Mod.* 267. *S. C.*

5. An act of bankruptcy committed before an execution executed, will avoid the execution.

Cole v. Davies. 724.

6. Removing goods for fear of an execution, no act of bankruptcy. *Ib.* 725

7. A ship carpenter may be a bankrupt.

Kirney v. Smith. 741

8. Trover by assignees of a bankrupt against a second vendee. *Ib.*

9. The petition against a bankrupt, is not necessary to be produced at a trial, for it may have been by parol, though the practice is otherwise. *Ib.*

10. *Per Lord Holt, Lord Raymond* 252—If a writ of execution is delivered to the sheriff, and the defendant becomes a bankrupt before it is executed, the execution is thereby superseded, and the goods not bound by the delivery, for the property ceases to be in the bankrupt, from the time of the act of bankruptcy committed.

Smallcomb v. Cross.

2 Lord *Raymond*.

11. A scrivener is made liable to be a bankrupt by 21 *Jac.* 1. c. 19. he is liable to be so for acts of bankruptcy described in 1 *Jac.* 1. c. 15. Page 852

12. If a share in the stationers company will make a man liable to the statutes of bankrupts. *lb.*

13. A plea of bankruptcy at large, must set forth the petition, and the debts owing to the petitioning creditors. 1548

14. A bond given by a bankrupt to leave his wife a sum of money in case of survivorship, is not discharged by the certificate. 1549

Strange.

15. He who has the body in execution, cannot be a petitioning creditor.

Burnaby's Case. 653

16. A debt contracted after an act of bankruptcy, is no ground for a commission.

Toms v. Mytton. 744

17. Note of a bond six years standing, ground for commission of bankruptcy.

Sapayn v. Wallinger. 746

18. Assignee of a bond, cannot petition for a commission of bankruptcy, being an equitable, not a legal creditor.

Medlicott's Case. 899

19. Note indorsed to a debtor of a bankrupt, after the bankruptcy, cannot be set off.

Marsh v. Chambers. 1234

20. Going out of town to gain the term, an act of bankruptcy.

Maylin v. Eyloe. 809

21. Bankrupt not admitted to prove his own act of bankruptcy, though released.

Field v. Curtis. 829

22. Assignee of a commission, may declare on a promise to the bankrupt.

Rig v. Wilmer. 697

23. What

Strange.

23. What meddling with the effects of a bankrupt, is a conversion.

Parker v. Godin. Page 813

24. A stranger disposes of a bankrupt's money in purchases, the assignee seizes part of the purchased effects, this affirms the whole transaction, and he cannot maintain trover for the money.

Wilson v. Poulter. 859

25. Debt upon contingency not yet happened, cannot be claimed.

Tully v. Sparkes. 869

26. All bonds, &c. payable at a future day, are within 7 Geo. I. c. 31.

Swaine v. De Mattos. 1211

27. How far certificate is evidence of bankruptcy.

Lock v. Major. 533

28. The bankruptcy of the obligor does not discharge a bond conditioned for his executor to do an act.

Tully v. Sparkes. 867

29. Bankrupt discharged from bills drawn before his bankruptcy, though protested and returned after.

Macarty v. Barrow. 949

30. Not discharged from a recognizance of bail on error, where the affirmance is after the bankruptcy.

Hockley v. Merry. 1043

31. Discharged of a contempt in not performing an award.

Baker's Case. 1152

32. When the breach of a bond is after a bankruptcy, the bond is not discharged.

Crooksbank v. Thompson. 1160

33. A bankrupt discharged from a judgment given after his bankruptcy for a debt due before.

Graham v. Benton. 1196

34. Separate creditor may come in under a joint commission of bankruptcy.

Howard v. Poole. 995

35. A

Strange.

35. A joint commission discharges each partner as to his separate debts.

Wickes v. Strahan. Page 1157

36. Future effects of a second bankrupt continue his property till seized.

Ashley v. Kell. 1207

37. Bankrupt discharged for faults in the commitment.

Rex v. Nathan. 880

38. The fortune of a wife may be settled on husband till he fails, and then to her separate use.

Lockyer v. Savage. 947

39. Delivery to the use of a creditor, vests the property before agreement, if he does not disagree after.

Atkin v. Barwick. 165

1 and 2 *Wils.*

40. Tenant in tail, mortgages for years, becomes a bankrupt, and dies, without suffering a common recovery, the assignees shall have the estate clear of the mortgage, by the statute 21 *Jac.* 1. c. 19. s. 12.

Beck v. Welsb. 276 v. 1

41. But if he had suffered a recovery, it would have let in the mortgage and other incumbrances.

Ib. 277

42. After the interlocutory judgment, and the award of a writ of enquiry, the plaintiff becomes bankrupt, and afterwards in his own name the writ is executed, and good without suing out a *scire facias* in the names of the assignees.

Bibbins v. Mantel. 358 v. 2

43. One who buys a coal mine, works it, and sells the coals, is not a trader within the statutes of bankrupt.

Port v. Turton. 169 v. 2

44. Trespass lies against the assignees under a commission sued out against a victualler, or any other person not liable to be a bankrupt, and the action lies before the commission be superseded, the whole having been done *coram non judice*.

Perkin v. Proflor. 382 v. 2

45. An

1 and 2 *Wils.*

45. An indorsee of a promissory note may be a petitioning creditor, though the drawer became a bankrupt after the payee made the indorsement.

Anonymous. Page 135 v. 2

3 *Wils.*

46. A bill of sale made by a trader two days before he absconded, is a fraud on the bankrupt laws, and void.

Linton v. Bartlet. 47

47. The defendant draws a bill of exchange upon the plaintiffs, payable to the defendant's own order, plaintiffs at his request, and on his promise to indemnify them, accept the bill, which becoming due after the day that the defendant became bankrupt, the plaintiffs pay the bill to prevent themselves from being arrested, the plaintiffs could not have proved this as a debt under the commission, so the defendant cannot plead his certificate in bar of this action brought against him for not indemnifying the plaintiffs.

Young v. Hockley. 346

48. The defendant drew a bill of exchange on the plaintiff, which the defendant promised to pay himself when it became due, afterwards the defendant was a bankrupt, and afterwards the plaintiff (having accepted the bill) was sued and obliged to pay it, resolved the plaintiff could not prove any debt under the commission.

Vanderheyden v. de Paiba. 528

1 *Black.*

49. If a sheriff takes goods of a bankrupt in execution after the act of bankruptcy committed, and before the commission issued, and sells them after the commission and assignment, trover will lie against him. *Cooper v. Chitty and Blackiston, M. 30 Geo. 2.* 65

50. Payment of bills to support the credit of a declining trader, without notice of any act of bankruptcy, not fraudulent. *Foxcraft v. Devonshire. H. 33 Geo. 2.* 193

51. The court will not take notice of a commission of bankrupt in a collateral way, so as to stay proceedings against a sheriff on an action for a wilful false return, pending which action he pays over monies (levied by execution, and kept in his hands above a year) to assignees under a commission sued since the action was brought against him on an act of bankruptcy previous to the execution. *Timbrell v. Mills, H. 33 Geo. 2.* 205

52. Assign-

1 *Black.*

52. Assignment of all, except a trifle, of a man's stock in trade, in favour of particular creditors, just before the act of bankruptcy committed, is fraudulent and void. *Compton v. Bedford, H. Vac. 2. Geo. 3.* Page 362

53. A bankrupt executor pleading a false plea after the commission issued in a suit by a creditor of his testator, is liable to execution for the costs. *Howard v. Jemmett, H. 3 Geo. 3.* 400

54. A trader may lawfully assign part of his stock, in favour of a particular creditor, on the same day on which he afterwards commits an act of bankruptcy. *Hooper v. Smith, Tr. Vac. 3 Geo. 3.* 441

55. The court will not upon a motion assist the relation back of an act of bankruptcy. *Clark v. Ryall, H. 8 Geo. 3.* 642

56. Preference of one creditor by a bankrupt, in sending him without his knowledge a bill by the post, is fraudulent and void. *Alderson v. Temple, Tr. 8 Geo. 3.* 660

2 *Black.*

57. Statute of limitations which had incurred against the petitioning creditor of a bankrupt, before the commission issued, shall not be taken advantage of by a stranger in an action brought by the assignees. *Quantock v. England, T. 10 Geo. 3.* 702

58. Court will not discharge a bankrupt on common bail, when the commission appears to have been grossly fraudulent. *Sowley v. Jones, M. 11 Geo. 3.* 725

59. A. becomes bail for B on a promise of indemnity, the bail-bond is assigned, and judgment had in an action thereon against A. who brings error in *Cam. Scacch.* B. becomes bankrupt, judgment against A. in *Cam. Scacch.* who brings error in parliament, which is non-prossed, and then he pays debt and costs, the damnification does not accrue till that payment, and is not covered by the commission and certificate, but action lies for A against B. the bankrupt, on his promise of indemnity. *Casaard v. Vanuerbeyden, M. 12 Geo. 3.* 794

2 Black.

60. Allowance of a bankrupt's certificate, has no relation back, so as to discharge the defendant's bail, if fixed before such allowance. *Walker v. Giblett. P. 12 Geo. 3.*

Page 811

61. *Assumpsit* will lie for the assignees of a bankrupt against a creditor who has levied his debt by *fi. fa.* after the act of bankruptcy committed. *Hitchin v. Campbell. T. 12 Geo. 3.* 827

62. Bill of exchange drawn on and accepted by A. but not due nor paid till after the drawer became a bankrupt, is not covered by the commission. *Young and others, v. Hockley. M. 13 Geo. 3.* 839

63. That a man cannot positively recollect a fact, but should rather believe the affirmative, is a full and satisfactory answer by a witness on a commission of bankrupt. *Thomas Miller's case. E. 13 Geo. 3.* 881

64. A general answer by a bankrupt under examination, that he has lost one thousand eight hundred and eighty-six pounds by selling under prime cost, is not satisfactory, especially if falsified by subsequent confessions of the disposal of different sums for other purposes. *Langhorn's case. T. 13 Geo. 3.* 919

65. Assignment of all one's stock in trade, together with certain leasehold houses to a creditor by way of mortgage, is an act of bankruptcy, and renders void as well the mortgage of the houses as of the goods. *Law v. Skinner. P. 15 Geo. 3.* 996

66. Commissioners of bankrupt have no authority to commit one suspected to detain effects of the bankrupt, for not attending to be examined upon the first summons. *Dyer v. Miffing, T. 15 Geo. 3.* 1035

67. An annuity bond if forfeited before the bankruptcy, should be valued, and proved under the commission, if not forfeited till after it cannot be so proved, and the obligor may be taken in execution on a judgment thereon. *Perkins v. Kempland, T. 16 Geo. 3.* 1106

68. False imprisonment lies against the commissioners of bankrupt for an illegal exercise of their discretion in improperly committing a bankrupt who has made a satisfactory answer. *Miller v. Seare. E. 17 Geo. 3.* 1141

2 *Black.*

69. An uncertified bankrupt going surreptitiously beyond sea, and refusing to assist his assignees in getting in his debts, is guilty of non-conformity, and cannot be discharged under the insolvent debtors act. *Norris v. Levi. E. 18 Geo. 3.*
Page 1188

70. A creditor who obtains a verdict before the commission, is intitled to prove his costs as well as his debt, though judgment not signed till after the commission issued, and having proved his debt, and otherwise acted under the commission, has made his election, and shall not afterwards resort to the bankrupt's bail. *Aylett v. Harford. T. 19 Geo. 3.*
1317

1 *Burr.*

71. The property of a bankrupt's goods is after assignment in the assignee, from the time of the act of bankruptcy by relation. *Cooper v. Chitty. 31, 32, v. infra. 440 and 817, to 820*

72. And the assignee may maintain trover against the sheriff who took them in execution after act of bankruptcy, and before the assignment, but sells them after the assignment; for selling was certainly unlawful, whatever the taking might be. *Pa. 31, 32, 33, and see Title, "Trover."*

73. Bail for a bankrupt who obtains his certificate, pending the action, shall be discharged if the certificate is prior to their being fixed, otherwise they remain liable.

Woolley v. Cobbe. 244, 245

74. But the bankrupt himself, though discharged of the original debt, is yet liable to the judgment in an action against him upon the bail-bond, for this is a new and distinct cause of action.

Cockerill v. Ouston. 436

75. By 21 *Jac. 1. c. 19. s. 2.* A trader who being arrested for debt, shall after such arrest, lie in prison for two months upon that or any other arrest or detention in prison for debt, or being arrested for £100. more shall escape out of prison (or procure his enlargement by putting in common or hired bail, repealed by 10 *Ann. ch. 15. s. 1.*) shall be accounted a bankrupt to all intents and purposes; and in the said cases of arrest, or lying in prison for such debt or debts, (or getting forth by common or hired bail) from the time of his or her said first arrest.

Rose v. Green. 439.

76. All

1 Burr.

76. All the bankruptcy acts must be construed according to their real intention, and so as to answer the ends of public benefit.

Rose v. Green. Page 439, 440

77. Escape, means a running away contrary to the sheriff's consent, not where by permission of the sheriff he is carried to another county on his road to a judge's chamber, upon an *habeas corpus*, this shall not make him a bankrupt and criminal. *Ib.*

78. Where sufficient bail is fairly put in, and the defendant afterwards at a future day surrendered, the bankruptcy shall not relate to the time of the first arrest, but only to the time of the surrender. *Ib.* -- For the bankruptcy commences only from actual lying in prison.

Ib. v. supra 31, *infra* 817 to 820

79. But when bail is put in, merely with the intent to surrender immediately, and they do so *instantly*, and the defendant is instantly committed *Cu iud. Mar.* this is only form, and (in effect) no bail at all, but a continuation of the same imprisonment, and therefore the bankruptcy shall here relate to the first arrest. *Ib.*

80. A conveyance made by a trader of his whole substance to a particular creditor, was under the circumstances of it, adjudged to be fraudulent, and an act of bankruptcy, although it was made by way of security, and for a valuable consideration, and executed, (but without delivery of possession), three weeks before any other act of bankruptcy, the principal circumstances were, that the trader continued in possession, and visibly acted as owner; that the rest of the creditors were imposed upon by false appearances, that the agents of the particular creditor told the rest of the creditors—"That the trader had mortgaged his leaseholds, but concealed his having assigned any thing else, that both the particular creditor and his agents, appeared clearly to be aware that possession was necessary," but had continued and originally intended, that there should be a delivery of possession, as soon as the trader should determine to become bankrupt, but not sooner, in order to evade the clause in 21 Jac. 1. chap. 19. § 2.—in other respects this conveyance was fair and honest, being intended to secure one *De Mattos*, in London, from being a sufferer by the country traders over drawing upon him, *De Mattos* having agreed to permit *Slador*, the country trader, to draw upon

upon him in *London*, and to advance as far as three hundred pounds for *Slador*, resolved—first, that the conveyance was fraudulent, and an act of bankruptcy within the 1. J. 1. c. 15. § 2.

Worfeley v. De Mattos. Pa. 467, to 485
v. *Infra.* Page 829, 833

81. All the bankrupts acts are to be taken together as one system of law, and they are to be construed favourably for creditors, and to suppress fraud. *Ib.* 474

82. Third, indemnity was a good and valuable consideration, and this deed was a fair transaction as between the parties. *Ib.* 474. v. *Infra.* 830

83. Fourth, but many transactions fair as between the parties, may yet be fraudulent as to third persons, by reason of deceit upon an injury to them. *Ib.* 474
v. *Infra.* 830

84. Fifth, this was one of those causes; the creditors were deceived by false appearances connected with a secret confidence. 475

The end and the means were both unlawful. *Ib.*

85. Sixth, the end was unlawful, for
First,—the preference aimed at was fraudulent and unlawful. *Ib.*

Secondly,—preference of a favourite creditor by an assignment of all, after making, and just before executing a determination to break, even if accompanied with a formal delivery of possession, is a fraud upon the whole bankrupt law, and would defeat the two main objects of it, viz. the management of the bankrupt's estate, and an equal distribution of it amongst all his creditors, who have trusted to his general credit. *Ib.* 476

86. Thirdly,—in like manner a conveyance calculated to postpone a particular creditor, is an act of bankruptcy. *Ib.* 477

87. Fourthly,—priority shall not be gained by secret lives. *Ib.*

88. Fifthly,—therefore conveyances of personal chattles by way of security, where possession is left with the bankrupt, shall not give any priority. *Ib.*

1 Burr.

89. Sixthly,—But conveyances of land are different, for land is holden without perception of profits by the title.
Worseley v. De Mattos. Page 484.

90. Seventhly,—there is also a great difference between conveyances of all, and of a part only, the latter may be publick, fair and honest, but the former must either be fraudulently kept secret, or produce an immediate bankruptcy.
Ib. 478. v. *Infra.* 830.

91. The means likewise were unlawful as well as the end, namely, the false credit, given to the bankrupt by leaving him in possession, and to act as owner, and the secret trust “to deliver the possession, so as to avoid the clause “in 21 Jac. 1. c. 19.”
Ib. 482, 483.

92. No deed made by a trader, can be fraudulent in a court of equity which is not fraudulent at law, and an act of bankruptcy.
Ib. 479, 481.

93. Every equivocal fact may be explained by circumstances none more than deeds, for hardly any deed is fraudulent upon the mere face of it.
Ib. 484.

2 Burr.

94. Certificate is not complete till allowed, nor shall relate to the signing by the commissioners and creditors, nor over reach a legacy left to the bankrupt after the signing but before the allowance, and assigned by the commissioners before allowance, but the creditors shall have it.

Tudway v. Bourn. 717, 718, 719.

95. Bankruptcy alone, nay even insolvency, (which bankruptcy does not necessarily import,) is no sufficient cause of a motion from the office of a common council man of a corporation.

Rex v. Mayor of Liverpool. 731 to 736.

96. A bankrupt who had regularly obtained his certificate, afterwards settles an old account with a creditor who did not appear to have come in under the commission, agrees that a balance of seventy four pounds was due from him at the time of his bankruptcy, and promised to pay it, “when he should be able.”

Bailey v. Dillon. 736.

97. A.

2 *Burr.*

97. As to the general question, "whether the bankrupt was or was not liable to the payment of it, upon this new acknowledgment and new promise," the court did not enter upon it. *Bailey v. Dillen.* Page 736, 737

98. But they discharged him upon common bail, (that being the particular question before them.) *Ib.* 737

99. If a bankrupt lies two months in prison, then the relation and consequently the property of the assignees in the bankrupt's goods, goes back to the time of the first arrest.

Coppendale v. Bridgen. 817 to 820. *v. Ante,* 439, 440

100. If execution (*a fieri facias*,) is sued out against a trader's goods, returnable within the two months, but not actually returned till after he has lain two months, &c. "*nulla bona*," is a good return, because it is then certainly a good one, *Ib.* But *quere* whether it would have been so if the return had been made upon the return day, which was within the two months, when it was uncertain whether he would or would not lie the two months in prison. *Ib.*

101. In the last case if the sheriff had returned "that he had levied the money," and had actually paid it over to the plaintiff, the sheriff might have been excused, but the plaintiff must refund it to the assignees. *Ib.*

102. L. a trader being really indebted to W. (in about one thousand eight hundred and forty pounds,) sent for W. told him, "he could not stand his ground," and proposed to secure him accordingly, he executed a general assignment to W. of every thing that he had in the world, but after payment of W's. debt, it was to be in trust for L. himself, as to the residue a defeasance in a separate deed was soon after executed, making the assignment void, upon payment of all the money due to W. (who was concerned with L. in circulating notes, many of which were outstanding,) but neither the assignment nor defeasance particularly liquidated, how much money was due from L. to W. the deed of assignment recited L's. being obliged upon urgent and necessary business to leave London, and that he could not raise money soon enough to answer all the demands that W. had upon him," there was no counter part of this deed, and the original remained in the keeping of L. the assignor, no possession was delivered, only L. gave a letter of attorney to B. his own clerk, (a person privy to the whole,) to collect,

lect, receive, dispose, &c. the goods still continuing in L's. house, no notice was given to L's. debtors.—*Wilson v. Day. Pa. 827. v. supra. 467 to 485.*—almost S. P.

103. This deed alone is in itself an act of bankruptcy, 'tis within 21 *Jac. 1. c. 19* §. 2.—and if permitted would defeat the whole system of the bankrupt laws.—*Ib. 829 to 833. v. Supra. 467 to 485.*

104. The circumstances confirm this particularity, there being no visible change of possession, a secret transaction, no notice, &c. *Ib. 830*

105. It was resolved, that a trader, (even before bankruptcy) cannot prefer one or more creditor or creditors to the rest by a conveyance of his whole estate and effects. *Ib. 829 to 833. v. Supra. 484.*

106. But he may pay a particular creditor, or he may mortgage a part of his estate and effects, (at least) to a particular creditor, provided he delivers possession at the same time.

Ib. 831. v. Supra. 484

107. Yet a colorable exception of a small part would not (*Per Lord Mansfield,*) help the matter, for the court would not suffer such an evasion to prevail. *Ib. 832.*

108. The system of the bankrupt laws is, "that the bankrupt's effects shall be taken out of his own possession and management, and put under that of the commissioner, and be divided equally, i. e. proportionably among all his creditors." *Ib. 829, 830*

109. Therefore L. became a bankrupt the moment he executed this deed, which puts his whole estate under the management of his own trustee, instead of the commissioners, and assigned it all to one creditor, leaving nothing for the rest. *Ib. 830*

110. A mortgage by a trader of ships abroad, or of cargoes upon the high seas is good, (notwithstanding the clause in 21 *Jac. 1. c. 19.*) though possession be not actually delivered.

Foxcraft v. Devonshire. 941

111. *John*

2 Burr.

111. *John Perrot*, a bankrupt, upon the last day allowed him, had this question propounded to him in writing by the commissioners, "as you admit that you have spent the last week with Mr. M. one of your assignees, to settle and adjust your accounts, and to draw up a true state thereof, to enable you to close your examination, and do likewise admit that upon such state thereof, it appears that after giving you credit for all sums of money paid by you, and making you debtor for all goods sold and delivered to you from your first coming into trade to the time of bankruptcy it appears that there is a deficiency of the sum of thirteen thousand five hundred and thirteen pounds, give a true and particular account what is become of the same, and how and in what manner you have applied and disposed thereof," to which question he refused to give any other than this general answer, "that on goods sold this last year he had lost upwards of two thousand pounds, and by mournings upwards of one thousand pounds, and that for nine or ten years he had been extremely extravagant, and spent large sums of money."—Whereupon they committed him until he should submit himself, &c. and full answer make to their satisfaction to the said question; on *habeas corpus*, he was remanded.

Reg v. Perrott. Page 1124, 1125

112. This question is a proper one, and the answer is insufficient and unsatisfactory. *Ib.* 1124, 1125

113. The power of the commissioners to examine the bankrupt, is not limited and confined within the time allowed him to submit to be examined, they may compel him to make any further answer after that time. *Ib.*

114. The 1 *J. 1. c. 15.* continues in force notwithstanding the subsequent statutes, and all the bankrupt acts ought to be taken together, so as to answer the general end and intention of the legislature. *Ib.*

115. The same man twice afterwards submitted to further examination, gave unsatisfactory answers, and was remanded the first time, he petitioned the lord keeper the second, he brought another *habeas corpus* here, both without success, at last he was convicted and executed for concealing his effects. *Ib.* 1216

3 Burr.

116. Being sued as executor pleaded a false plea, which being found against him, the plaintiff had judgment against him

him, *de bonis propriis*, for the costs, after which he obtained his certificate, this judgment, *de bonis propriis*, for the costs, is not discharged by the certificate.

Howard v. Jemmet. Page 1368, 1369

117. If an executor becomes bankrupt, the commissioners cannot (*Per Lord Mansfield*,) seize the specific effects of the testator, not even in money, which specifically can be distinguished and ascertained to belong to such testator.

Ib. 1369

118. An action upon the case will lie for maliciously suing out a commission, notwithstanding the particular provision in 5 G. 2. c. 30. §. 23. for preventing the taking them out maliciously.

Brown v. Chapman. 1419

119. A *feme covert* sole trader in *London*, is liable to a commission of bankruptcy.

Lavie v. Philips. 1782 to 1784

120. If the husband of such *feme covert*, sole trader in *London*, becomes a bankrupt, his assignees cannot take her effects to the prejudice of her creditors, nor could the husband himself meddle to the prejudice of her creditors. *Ib.*

4 *Barr.*

121. *La Roche* and *Wilting*, being possessed of a promissory note of *Bryer* and *Everard*, payable to them or order for six hundred pounds, indorsed it to *Temple*, to whom they were indebted to a larger amount, and the same morning (being *Friday*,) sent it in a letter to him at *Trowbridge*, which letter was received by him there on *Sunday*, and could not be before *La Roche* and *Wilting* committed acts of bankruptcy on the intermediate *Saturday*, they had given *Bryer* and *Everard* two notes for three hundred pounds each, which had not been discharged, it was stated, "that the said note was so indorsed and sent to the said defendant *Temple*, in contemplation of their insolvency and subsequent failure," judgment was given for the plaintiffs the assignees who had brought *trover* against *Temple* for this note; for the indorsement, and sending of the note to *Temple*, was fraudulent upon all the other creditors, and particularly *Bryer* and *Everard*.

Alderfon v. Temple. 2235, &c.

122. If bills of exchange are sent, or goods consigned to a person who has paid the value before, and the sender becomes

comes bankrupt, the assignees shall not take them back, though the person to whom they were sent did not then know of their being sent back, but if the consideration has not been received, the court of Chancery always interposes.

Alderson v. Temple. Page 2239

4. *Burr.*

123. Fraudulent conveyances are acts of bankruptcy.

Ib. and 2240

124. All acts to defraud creditors are void.

Ib.

125. An insolvent creditor cannot go out of the common course of trade and business to prefer a particular creditor or creditors.

Ib.

126. A collateral independent express covenant by an assignee of a lease, "to indemnify the assignor," is not discharged (with respect to subsequent breaches,) by the assignee's becoming bankrupt, the assignment of his effects, and his obtaining a certificate, it was not a debt due or owing at the time of his becoming bankrupt, and the assignor could not prove it as such, under the commission.

Fen. v. Lowndes.

Ib. and 2246.

127. A fraudulent sale of goods by the bankrupt to one of his creditors in concert and combination to keep up the bankrupt's sinking credit, in order to prefer this one creditor and cheat others, is void, (tho' it may not be an act of bankruptcy in itself and does not alter the property of the goods, and *trover* will lie by the assignees for the goods.

Martin v. Peawtress.

2477 to 2482.

5. *Burr.*

128. Petitioning creditor's debt was of more than six years standing, but the bankrupt had submitted to the commission without objecting, this objection shall not afterwards be taken by a third person.

Quantock v. England.

2628 to 2630

Cowper.

129. A certificate discharges a bankrupt from a debt accruing before the commission, though judgment be not obtained till after the certificate allowed.

Bouteflower v. Coates.

25

130. A

Cowper.

130. An uncertificated bankrupt may be a witness to diminish but not to increase the fund, therefore in an action between a man unconnected with him (who was plaintiff,) and a creditor of him, (who was defendant,) the bankrupt may be admitted to prove that the goods in question were delivered to his use, and upon his credit only, and not to the use or upon the credit of the defendant.

Butler v. Cooke. Page 70

131. So in action by assignees for money due to the bankrupt's estate, the bankrupt may be a witness for the defendant, but not for the assignees, unless he gives a release, and has got his certificate.

Langden et al. v. Walker, cited. *Ib.*

132. A trader in contemplation of absconding, inclosed certain bills to T. a particular creditor, saying he has the honor to shew him that preference which he conceives is his due, this is done without the privity of T. and followed by an act of bankruptcy, before the notes could be delivered; the essential motive being to give a preference, and the act incomplete, it is void, though in favor of a very meritorious creditor.

Harman v. Fishbar. 117

133. But a payment made by a trader in the ordinary course of dealing, or enforced by legal process, though but the evening before, his bankruptcy is good. *Ib.* 123.

134. Though the act be complete, yet if the sole motive was to give a preference, it shall be void; and if by deed, is in itself an act of bankruptcy.

Linton v. Bartlett, cited. *Ib.* 124

135. But if the preference were only consequential, the case might be different, as if a payment were made, or an act done, in pursuance of a prior agreement. *Ib.* 125

136. Though the judgment on which a bankrupt is in custody, be subsequent to the commission sued out, yet if the cause of action arose before the bankruptcy, the bankrupt may be discharged by the statute 12th Geo. the third, chap. 47. sec. 2. and interest and costs accrued since, are likewise discharged.

Blandford et al. v. Foote. 138

137. The

Cowper.

137. The enacting part of section 11. stat. 21 *Jacobus* 1st. chap. 19. is not restrained by the preamble, but extends to goods of a third person, which he has permitted the bankrupt to be in possession of, and to sell as his own, as well as to the bankrupt's original property kept and disposed of by him, as his own, after having conveyed it to a third person.

Mace v. Cadell. Page 232

138. One who has traded to England, whether native, denizen or alien, though never a resident trader in England, but coming over here occasionally, and committing an act of bankruptcy, is an object of the bankrupt laws.

Alexander v. Vaughan. 398

139. A fraudulent judgment and execution, though void against creditors, is not in itself an act of bankruptcy.

Clavey et al. v. Huyley. 427

140. One of three partners in a ship and cargo, the outfit of which was four thousand six hundred and fifty-eight pounds, pays only four hundred and ten pounds, in part of his third share, and gives his notes for the remainder, but before they become due, is a bankrupt; the other partners cannot by voluntarily discharging the notes, stand in his place for the share of the profits, but the assignees are entitled to a full third, both of the profits, and of the value of the ship.

Smith, assignee of Hague, v. De Silva. 469

141. A surety of a bond, who pays the debt after the bankruptcy of his principal, is not barred by the certificate, though the bond was forfeited before the bankruptcy.

Taylor v. Mills. 525

142. A bond for an annuity for a term of years, is within the statute 7 Geo. 1. c. 31. and may be proved under the commission as a debt, payable at a future day, though not given in the course of trade.

Pattison v. Bankes. 540;

143. Statute 7 Geo. 1. (above cited), extends to all personal securities for a valuable consideration, where the time of payment is certain, though future.

Ib. 543

144. A

Cooper.

144. A bankrupt may in consideration of a debt, before the bankruptcy, and for which the creditor agrees to accept no dividend, make such creditor a satisfaction for the whole, or in part, by a new undertaking, and assumpsit will lie upon such undertaking.

Trueman v. Fenton. Page 544

145. A pretended sale to a creditor, though of part only of a trader's goods, if not in the course of trade, but merely calculated to give a fraudulent pretence, and to defeat the equality of the bankrupt laws is void; though the delivery of the goods to the creditor, and his assent to the transaction be compleat, before the act of bankruptcy, not being by deed.

Rust v. Cooper. 629

146. No fraudulent transaction which is not by deed, is in itself an act of bankruptcy. *Ib.* 633

147. But if a creditor be paid in the course of business, it is good, notwithstanding the debtor's knowledge of his own affairs, or his intention to break, because such preference is got consequentially, not by design. *Ib.* 634

148. So where a creditor presses for payment, and the debtor makes a mortgage of goods, and delivers possession. *Ib.*

149. A bond payable by installments, given in consideration that the obligee would marry and settle a small estate upon a servant maid, and also maintain a bastard of the obligor, is within the statute 7 Geo. 1. chap. 31. and may be proved under a commission of bankrupt against the obligor.

Ex parte Cottrell. 742

150. Merely drawing bills upon a person's own account, at the expence of paying a quarter *per cent.* commission besides at interest at five *per cent.* for their being discounted, and borrowing accommodation, notes in lieu of his own, to the same amount, will not make a man an object of the bankrupt laws.

Hankey v. Jones. 745

151. Drawing, and re-drawing, may or may not amount to a trading in merchandize, it depends upon circumstances.

Ib. 751

152. If

Cowper.

152. If a person in the country draw on his banker in London, for the purpose of discharging a particular debt, and direct his banker to re-draw upon him to the same amount, that alone is not a trading in merchandize.

Hankey v. Jones. Page 751

153. But where two persons who have large sums of other people's money in their hands, are in a course of drawing and re-drawing upon each other for the amount of such sums, that is a trafficking in exchange. *Ib.*

154. As where A. and B. the one a military agent in England, and the other in Ireland, drew on each other for the amount of 280,000*l.* and upwards, though neither took commission money, yet each had a visible profit from the exchange thereof, such drawing and re-drawing was held to be a trafficking in exchange. *Ib.*

155. Whether a man is a trader within the several statutes against bankrupts, is a question of law, not of fact. *Ib.* 752

156. A second commission taken out, pending a former, under which a bankrupt has not obtained his certificate, is void.

Martin v. O'Hara. 823

157. All the effects of the bankrupt, taken under such second commission (No. 28), belong to the creditors under the first. *Ib.*

158. A bankrupt came from Holland, with intent to surrender on the forty second day, but hearing his time was enlarged, resolved not to surrender, till the enlarged day, in the mean time he was arrested, and the court held he should not be discharged, for till actual surrender, the statute § Geo. 2. meant only to protect a bankrupt, whilst he is going to make such surrender.

Kenyon v. Solomon. 156

159. In *assumpsit* against the vendee of goods, sold by the bankrupt after the commission, they need not name themselves assignees in the declaration, *secus*, if on a contract made by a bankrupt before the commission.

Evans et al' v. Mann. 569

160. And

Cowper.

160. And if there was an actual treaty between them and the defendant, relative to the matter in litigation, it seems they need not prove the trading bankruptcy, &c. for the action is founded on an actual contract, and they may recover *suo jure*.

Evans et al. v. Mann. Page 570

161. An indorsee of a promissory note, payable three months after date, may be discharged under an insolvent act, which takes place before the three months are expired.

Workman v. Leake. 22

162. So may the obligor of a bond conditioned for payment of money at a future day, though the act took place before the day limited by the condition for payment.

Paget v. Wheat (in a note.) 23

163. When a bankrupt is clearly entitled to his discharge, he needs not be surrendered by his bail, the court will in the first instance order an *exoneretur* to be entered on the bail piece.

Martin v. O'Hara. 824

Douglas.

164. Though a prior commission has been superseded by consent, a certificate under a second bankruptcy does not protect future effects, unless the bankrupt pays fifteen shillings in the pound, under the second commission.

Thornton v. Dallas. 46 to 49

165. An assignment, by deed of lease, part of a bankrupt's estate, in contemplation of a bankruptcy, is itself an act of bankruptcy.

Devon v. Watts. 86, to 89

166. So is an assignment of all a trader's stock, though only by way of security, and for valuable consideration.

Ib. 87

167. So though such assignment, No. 3, is only one-third of his stock.

Ib. 87

168. A parcel assignment of only part of a trader's stock, and though by way of security, if done in contemplation of a bankruptcy, is void.

Ib. 87

169. A

Douglas.

169. A demand against a bankrupt, cannot be set-off in an action by his assignees for trover and conversion, subsequent to the bankruptcy, of effects belonging to the bankrupt estate.

Wilkins v. Carmichael. Page 108

170. On a general plea of bankruptcy under 5 Geo. 2. chap. 30, to an action on a bond, the plaintiff may give in evidence the condition (without having set it out on the record), to shew that the action is not barred by the certificate.

Alsop v. Price. 155, to 160

171. When a bond conditioned for the re-payment of a sum of money by a principal and surety, has not been forfeited till after the bankruptcy of the surety, the debt cannot be proved under his commission, and therefore he may be sued upon it, notwithstanding his certificate, the debt as to him being contingent, and not within 7 Geo. 1. chap. 31. *Ib.*

172. Bonds payable at a future day, are within 7 Geo. 1. chap. 31. though not given for goods sold by a trader. (in note) 159

173. Debts which at the time of bankruptcy may never become due, (and which are not within 19 Geo. 2. chap. 32.); cannot be proved under the commission, and therefore are not discharged by the certificate. *Ib.* 159

174. Money owing out of *England*, (as in the plantations), to a bankrupt, may be attached by the laws of the place, after the bankruptcy, for a debt due before it.

Le Chevalier v. Lynch. 161, 162

175. *Quere.*—If a bankrupt after his certificate pay interest on a bond, conditioned for the re-payment of money, granted before the bankruptcy, whether this will amount to a new contract for the principal in the bond, so as to make him liable.

Alsop v. Browne. 182, 183

176. When the petitioning creditor's debt is by bond, it is not sufficient in an action by the assignees for them to prove an acknowledgment of the debt by the bankrupt, but they must produce the subscribing witness to prove the execution of the bond.

Abbot v. Plumbe. 205, 206
177. If

Douglas.

177. If some of the bankrupt's creditors are induced by money to sign the certificate, though the bankrupt does not know of it at the time of their signing, nor even when he makes the necessary affidavit, in order to obtain the necessary allowance by the Chancellor, if he knows it, before the actual allowance, the certificate is void.

Robson v. Calze. Page 216 to 218

178. If money is given without the bankrupt's privity, to induce creditors to sign, in order to deprive him of the effect of his certificate, and sufficient in number and value have signed, exclusive of those who have taken money, the certificate shall be void.

Ib. 218

179. But if in such case the necessary number and value is not complete, exclusive of those who have taken money, it is void.

Ib.

180. The depositions of the act of bankruptcy when recorded, according to the 5 *Geo. 2. chap. 30*, § 41, (or copies thereof,) are evidence in an action at law, to prove the precise time of the act of bankruptcy, if such time is specified in them.

Fanson v. Wilson. 244, to 247

181. An inaccuracy in 5 *Geo. 2. chap. 30*. relative to the method of attesting the record of proceedings before the commission of bankrupt.

Ib. 245

182. A debt contracted before the party entered into trade, may be the ground of a petition for a commission of bankruptcy.

Butcher v. Easto. 282, & n. (b)

183. If a trader execute a bill of sale of all his stock and effects, to pay certain creditors, the overplus, if any, to be accounted for to himself, this is an act of bankruptcy.

Ib. 283

184. If a bankrupt after he has obtained his certificate, and who trades again for himself, is left for several years in possession of his house, household goods and furniture, in order to assist in settling the affairs of the bankrupt's estate, the assignees repeatedly stating the goods, &c. in their accounts with the creditors, as part of the estate, such possession does not fall within 19 *Jac. 1. chap. 1*. § 11. so as to vest the goods in assignees under a new commission.

Walker v. Burnell. 303, to 306

Douglas.

185. *Assumpsit* will lie for a creditor's share, under an order for a dividend.

Brown v. Bullen. Page 392, to 394

186. And in such action, the proceedings under the commission are conclusive evidence of the debt. *Ib.*

187. And the assignees cannot in such action set off a debt due to the plaintiff's estate by the plaintiff. *Ib.*

188. If a creditor has taken money for signing a bankrupt's certificate, it shall be recovered back in an action for money had and received, because of the oppression, and that there is not *par delictum*.

Brown v. Rivers. 455, 670, to 672

189. An agreement to pay money to the assignees of a bankrupt, on his certificate being allowed, though for the benefit of all the creditors, is void, under 5 *Geo. 2. chap. 30. § 11.*

Jones v. Barkley. 669, to 673

190. Bankruptcy is no plea in bar to an action of trespass for mesne profits.

Goodtitle v. North. 584

1 *Durnford and East.*

191. Where S. L. was arrested for the amount of goods, and E. L. in order to procure his discharge, became bound as security with him in a bond to the plaintiff, payable by instalments, and before the first default, E. L. became a bankrupt, the plaintiff is bound to prove his debt, under the commission, by virtue of 7 *Geo. 1. chap. 31.* for the credit was given to both.

Brooks and another. v. Lloyd. 17

192. A person who rents a brick ground, and makes bricks thereon for publick sale, and buys sand and fuel, which are necessary ingredients for converting the earth and clay into bricks, is subject to the bankrupt laws.

Wells v. Parker in error. 34

193. Renting a brick ground as a distinct occupation, is a mode of purchasing the clay. *Ib.*

194. If a man exercise a manufacture from the produce of his own land, as a necessary or usual mode of enjoying that

that produce, he shall not be considered as a trader, though he buy necessary ingredients to fit it for the market; but where the produce of the land is merely the raw material of a manufacture, not the necessary mode of enjoying the land, there he is a trader.

Wells v. Parker in error. Page 38, 39

195. As in the case of a farmer who makes cheese on his own land, and buys runnet and salt, he is not a trader.
Ib.

196. So where a man makes his own apples into cyder.
Ib.

197. Proprietors of allum works are not traders. 38, 9

198. Neither are the workers of coal mines. 38

199. Whether bankruptcy is a plea to an action of covenant for rent.

Ludford v. Barber. 86

200. In the case of the South Sea Company, the act by which all their property was taken out of their hands, and vested in trustees, for the satisfaction of their creditors, was held no bar to an action of covenant.

Hornley v. Houlditch. cited 92

201. Bankruptcy is a good plea to an action of debt on the *reddendum* in a lease.

Wadham v. Marlowe. cited 91

202. If a bankrupt give preference to a creditor, under an apprehension however groundless, of legal process, such preference is valid. *Thompson and others, assignees of Wiseman v. Freeman.* 155

203. A bankrupt is not entitled to any maintenance out of his effects, during his examination. *Thompson and others, assignees of Nelson v. Councill.* 157

204. If any person during a bankrupt's examination, take any thing out of his effects, and convert it into money, though for the necessary subsistence of the bankrupt and his family, the assignees may maintain *trover* against such person.
Ib.

1 *Durnford and East.*

205. An execution against the goods of a bankrupt, taken out after his certificate is signed by the creditors, and before it is allowed by the Chancellor, is void.

Callen v. Meyrick. Page 361

206. The statute 5 Geo. 2. c. 30. only relates to the discharge of the person of the bankrupt, who is in custody on a judgment obtained before the allowance of the certificate. *Ib.*

207. A specific sum of money received by an overseer of the poor, is not such a debt as can be proved under a commission of bankruptcy against him, before his accounts are delivered in.

The King v. Egginton. 369

208. If the money were kept apart from that bankrupt's general property, the assignees could not have claimed it. *Ib.* 370

209. The plaintiff after judgment, and a writ of error allowed, having become a bankrupt, his assignees cannot sue out a writ of *scire facias* in their own names, to compel an assignment of errors, till some judgment be given, and then it must be done immediately after such judgment.

Kretchman v. Beyer, in error. 463

210. An inn-keeper who sells liquors out of the house, to all customers applying for it, is subject to the bankrupt laws, however inconsiderable the extent of such dealing, and the profits arising from it may be.

Patman v. Vaughan. 572

211. So is a farmer who buys and sells horses, with a view to make profit by them, though the instances be few.

Bartholomew v. Sherwood. 573 a.

212. A surety who does not pay the debt of the principal, till after his bankruptcy, though called upon, and liable to pay it before, may hold the principal to bail, notwithstanding his certificate, for as the debt does not arise till the money is paid, it could not be proved under the commission.

Paul v. Jones. 599

213. The

Durnford and East.

213. The assignor of a *chose in action*, who is become a bankrupt, may sue the debtor in his own name, for the benefit of the assignee.

Winch v. Keeley. Page 619

214. A debt due to a bankrupt, as trustee for another, does not pass under the assignment of his effects by his commissioners. *Ib.*

215. A bond and warrant of attorney, to confess judgment given by a bankrupt after his bankruptcy, in order to obtain his liberty, is not barred by his certificate, although the original debt were contracted before.

Birch v. Sharland, 715

216. The old debt was extinguished by such bond, given for such purpose. *Ib.*

217. Assignees cannot make themselves parties to the record in any intermediate stage of the proceedings, but it must be immediately after judgment, though an interlocutory judgment is sufficient for that purpose.

Kretchman v. Beyer, 463

218. Trespass will not lie by the assignees of a bankrupt, against a sheriff, for taking the bankrupt's goods in execution, after an act of bankruptcy, and before the issuing of the commission, notwithstanding he sells them after the issuing of the commission, and after a provisional assignment, and notice from the provisional assignee not to sell.—*Smith and another, assignees of Clarke, v. Milles.* 475

219. Of the plea of discharge under an act of insolvency, or certificate as a bankrupt.

Birch v. Sharland. } In this case the defendant being in
1 *Term. Rep.* 715. } execution at the suit of the plaintiff,
————— in September, 1735, a commission of
bankruptcy issued against him soon after; in order to re-gain his liberty, he gave the plaintiff a bond and warrant of attorney, to confess a judgment for the old debt; the defendant having obtained his certificate, it was contended for him, that the bond having been given for the old debt, it was discharged by the certificate; but the court held that this bond was given for a new consideration, (the obtaining the defendant's liberty), and so was not discharged by the certificate.

Winch.

1 *Durnford and East.*

220. Therefore where a *bankrupt* had assigned his interest in a debt by deed poll to a third person, *he* was notwithstanding allowed to bring his action for the benefit of the person to whom he had made the assignment, and recovered; for the statute 1 Jac. 1. c. 15. only gives to the assignees such things in which the bankrupt has a *beneficial interest*, which in this case he had not, being merely a trustee for another. *Winch v. Keeley. Hill. 27 Geo. 3. 1 Term. Rep.*
Page 619

221. Whether proof of a debt of one hundred and sixty-one pounds, to one of the petitioning creditors, there being more than three, will support the commission of bankrupt. *Qu.* 475

2 *Durnford and East.*

222. A declaration in a *scire facias*, by the assignees of a bankrupt, stating, "that he became a bankrupt within the meaning of the statutes, &c. and that his goods and effects were afterwards in due manner assigned to the plaintiffs," is sufficiently certain without alledging, that the party was a bankrupt, or that his effects were assigned by deed.

Winter v. Kretchman. 45

223. Assignees of a bankrupt may sue both in the *debet* and *detinet*.

Ib. 46

224. Where an act is a clear unequivocal act of bankruptcy, it cannot be explained by any subsequent circumstances.

Colkett v. Freeman. 59

225. Therefore where A. was denied in the morning, by express orders, to the holder of a bill which was due, it was a complete act of bankruptcy, though he afterwards paid the bill before five o'clock in the same day, and though by the custom of merchants in *London*, the payer of a bill has the whole day on which it becomes due, till five o'clock to discharge it. *Ib.*

226. But where the act is in itself doubtful, it may be explained. *Ib.*

2 Durnford and East.

227. A bill having become due, and the drawer being pressed for payment, desired the holder to call upon him the next morning at a friend's house, and he would pay him; the holder went accordingly, and was denied at the drawer's request; upon being asked by his friend, if he was aware that he had committed an act of bankruptcy, he answered with surprise in the negative, and said he did not mean to do so, and went afterwards and paid the bill.—Lord Mansfield told the jury, that if they were satisfied that the denial had been with a view to delay the creditor at the time, it was an act of bankruptcy, and if so, it could not be purged by paying the bill,

Colkett v. Freeman. Page 59

228. If a surety bound with his principal, for payment of money by instalments, take a bond from the principal, conditioned for payment of the amount of the instalments, before the first of them will be due, and before that time the principal become bankrupt, and obtain his certificate, and afterwards the instalment bond is discharged by the surety, still he cannot maintain an action against the principal, for money paid to his use.

Toussaint v. Martinnant. 100

229. If no bond had been given, the law would have raised an *assumpsit* against the principal, but as the surety did not rely on the promise which the law would have raised, but took a bond as a security, he cannot resort to an action of *assumpsit*.

104

230. But he might have proved the bond under the commission.

Ib., &c. Martin v. Court. 640

231. Consequently the bankrupt's certificate is a bar to an action, by the surety on the counter bond.

Ib.

232. A banker is not justified in paying the drafts of a person who has placed money in his hands, after he has notice of an act of bankruptcy committed by him.

Vernon v. Hankey. 113

233. A proviso in a lease for twenty-one years, that the landlord shall re-enter on the tenant's committing an act of bankruptcy whereon a commission shall issue, is good:

Roe dem. Hunter v. Galliers. 133

234. Where

2 *Durnford and East.*

234. Where a trader becomes a bankrupt by lying in prison two months, the act of bankruptcy relates back to the arrest, so as to vest his property in the assignees from that time.

King v. Leith. Page 141

235. Therefore the assignees may maintain an action for money had and received against a person, who having notice that a commission would be issued against him, sold his goods and paid him the produce, before the expiration of the two months. *Ib.*

236. Where after a recovery in ejectment, and after an action of trespass for mesne profits, the defendant became a bankrupt, and the jury did not include the costs of the ejectment in their verdict, in executing a writ of enquiry, in the action for mesne profits, the court refused to set aside the inquisition, because the plaintiff might have proved the costs as a debt, under the defendant's commission of bankrupt.

Gulliver v. Drinkwater. 261

237. The plaintiffs, together with A. and B. being owners of one ship, and the defendant of another, a prize was taken, condemned, and shared by agreement between them; afterwards the sentence of condemnation was reversed, and restitution awarded with costs, which was paid solely by the plaintiffs; A. and B. having in the mean time become bankrupts, an action cannot be brought by the plaintiffs alone, for a moiety of the restitution money and costs, because it was either a partnership transaction when A. and B. ought to be joined, or not, when separate actions should be brought by each of the persons paying.

Graham v. Robinson. 282

238. When the assignees of a bankrupt have recovered a sum of money from the bankrupt's banker, received by him, and paid over to a creditor of the bankrupt, with knowledge of the bankruptcy, they cannot recover the same sum from the creditor, though he received it after notice of the bankruptcy.

Vernon and others, assignees of Tyler, v. Hanson. 287

239. But the assignees had their option at first to bring the action against the banker, or against the person to whom the banker paid the money, under the above circumstances. *Ib.*

240. Where

2 Durnford and East.

240. Where a ship was mortgaged at sea, with a proviso that the mortgagee should continue in possession till failure of payment of the mortgage money on demand, the grand bill of sale was delivered, and the mortgagor became bankrupt before the arrival of the ship, and the mortgagee took possession on her arrival; he may maintain *trover* against the assignees, who took the ship from him, notwithstanding he made no demand either on the bankrupt or his assignees.

Atkinson v. Maling. Page 462

241. An assignment of goods at sea, as a collateral security for a debt, and a subsequent indorsement of a bill of lading, are good as against the assignees of the assignor, who committed an act of bankruptcy between the assignment of the goods, and the indorsement of the bill of lading.

Lempriere v. Pasley. 485

242. Those who are privies, and assent to a deed of assignment by a debtor, cannot set it up as an act of bankruptcy.

Bamford v. Baron. (in note.) 594

243. If a trader after committing an act of bankruptcy take a house, and agree to pay half a year's rent in advance, where by the custom of the country, half a year's rent becomes due on the day on which the tenant enters, the landlord after an assignment under the commission, and before the year expires, may distrain the goods on the premises for half a year's rent, or if he buy the tenant's goods at the sale, under the commission, he may retain the amount of the half year's rent.

Buckley v. Taylor. 600

244. For though a bankrupt cannot give a *lien* on any particular goods, yet he may take a demise, and agree that the rent shall be payable on a particular day; in which case the law gives the landlord a power of distraining on that day.

Ib. 603

245. Assignees of a bankrupt having received fifteen hundred pounds from a debtor to the bankrupt, as a debt due to his estate, and having commenced an action against him for a further demand on the same account, to which he had only pleaded the general issue, agreed with him to refer all matters in difference between the parties in the cause, the arbitrator has power to award, that the assignees shall re-pay a part of the sum already received, if it appear to have been paid by mistake.

Macolm v. Fullarton. 645

246. The

Bankrupt.

2 *Durnford and East.*

246. The only case where a party shall be bound by the payment of money, though by mistake, is where it is paid into court, under a rule.

Malcolm v. Fullarton. Page 645

247. If the payee of a bill of exchange received from a third person as the price of an estate, gave time to the drawee on condition that he shall allow interest, and afterwards the drawee discharge the bill, having in the mean time committed an act of bankruptcy, this is not such a payment in the ordinary course of trade, as is protected by 19 Geo. 2. c. 32. and the assignees may recover the money from the payee.

Vernon v. Hall. 648

248. If A. be bound with B. as a surety for the payment of a sum certain, and take an absolute bond from B. payable the day before the original bond will become due, and B. become a bankrupt before the day of payment, A. may prove this debt under the commission, and B's certificate will be a bar to an action by A. on the counter-bond, though A. does not pay the original bond, till after B. has committed an act of bankruptcy.

Martin v. Court. 640

249. An agreement between a debtor and his creditors, that they will accept a composition in satisfaction of their respective debts, to be paid in a reasonable time, cannot be pleaded to an action brought by one of the creditors, to recover his whole demand.

Heathcote and others v. Crookbanks. 24

250. But if the debt had been ascertained by the agreement, and a fund provided, and all the creditors bound to forbear, it seems that would have been a good plea.

251. So if the debtor had assigned over all his effects to a trustee, in order to make an equal distribution amongst all his creditors, that would have been a good consideration in law for the promise, *Ib.*

252. If all the creditors of an insolvent consent to accept a composition for their respective demands, upon an assignment of his effects by a deed of trust, to which they are all parties, and one of them, before he executes, obtain from the insolvent a promissory note for the residue of his demand, by refusing to execute till such note not be made, the

the note is void in law, as a fraud on the rest of the creditors, and a subsequent promise to pay it, will not maintain an action.

Cockshot v. Bennett. Page 763

3 Darnford and East.

253. Where a bankrupt is in the possession of the goods of another, *bona fide* with the owner's consent, at the time of the bankruptcy, for a specific purpose, beyond which he has not the right of disposition or alteration, that is not such a possession as entitles the assignees to recover the value of them, under 21 Jac. 1. c. 19. s. 11.

Collins v. Forbes.—*Tr. Geo. 3.* 316

254. If a demand be payable at all events, though at a future day it may be proved under a commission of bankruptcy against the debtor, or set off against an action brought by his assignees, but if it rest in contingency whether it will become payable or not, it cannot be so proved or set off, unless it be secured by a penalty, which is forfeited at law.

Hancock v. Entwisle. *M. 30 Geo. 3.* 435

255. Therefore where an agreement was made between the bankrupt and the defendant, that a loss upon cotton which the latter had sustained by means of the former who was a broker, should be fixed at a sum certain, and that in satisfaction of that sum, the bankrupt should for four years recommend certain parcels of cotton to the defendant, which he should purchase by notes, at three months date, the clear produce on the sale of which the bankrupt undertook, should amount to the sum so agreed upon before the former loss, in default of which he was to make good the deficiency if living, it was held that such sum could not be set off by the defendant, to a demand made by the assignees of the bankrupt. *Ib.*

256. An action does not abate by the plaintiff's becoming a bankrupt.

Waugh v. Austen. *M. 30 Geo. 3.* 437

257. And where the plaintiff became a bankrupt between the interlocutory and final judgment, and sued out execution in his own name, the court refused to set aside the proceedings. *Ib.*

258. When a creditor has a demand on his debtor, which is capable of being ascertained without the intervention of a jury, and which does not sound merely in damages, and the

the debtor becomes a bankrupt, it may be proved as a debt under the commission.

H. 30 Geo. 3. Utterston v. Vernon. Page 539

3 *Durnford and East.*

259. Therefore if A. lend B. so much stock, to be replaced as stock without naming any particular day, and B. become a bankrupt, A. may come in under the commission for the price of the stock on the day of the bankruptcy. *Ib.*

260. The 7 Geo. 1. c. 31. is a declaratory law.

Ib. 546

261. A. gave B, a bond to secure an annuity, and before any payment became due, A. lent B. a sum of money, on which it was agreed that B. should retain the payments of the annuity as they became due, till that sum was discharged, then B. became a bankrupt, and the agreement to retain was held a good plea to an action on the bond by B's assignees; for the payment accruing after the bankruptcy, which agreement and retainer being equivalent to a plea of *solvit ad diem.* *Sturdy v. Arnaud. E. 30 Geo. 3. 599*

262. A woman may before marriage with the consent of her intended husband, convey all her stock in trade and furniture to trustees, to enable her to carry on her business separately, and if the husband do not meddle with them, and there being no fraud, such effects (though fluctuating,) are not liable to his debts.

Jarman v. Woolloton. E. 30 Geo. 3. 618

263. But whether the trade be carried on solely by the wife or jointly with the husband is a question of fact for the jury, and if they determine the latter, the assignees of the husband are entitled to the stock in trade, under the 21 Jac. 1. c. 19. *Ib.*

264. But even in such case they are not entitled to the furniture, though removed to the husband's house. *Ib.*

265. It is no objection to such a settlement, that there is not inventory of the goods intended to be so settled. *Ib.*

266. The question in all such cases, is whether the possession is consistent with the deed.

Tr. 24 Geo. 3. Hascinton v. Gill. 620

267. And

3 *Durnford and East.*

267. And where cows on a dairy were so settled, the wife was also held entitled to the increase and produce therefrom.
Haseinton v. Gill. Page 620

4 *Durnford and East.*

268. A plea of bankruptcy given by the 5 Geo. 2. c. 30. s. 7. must state that the cause of action accrued before the bankruptcy; stating that an indenture on which an action of covenant is brought, was executed prior to the bankruptcy, is not sufficient.

Charlton v. King. Hil. 31 Geo. 3. 156

269. An insolvent assigned over his effects for the benefit of his creditors, and in the deed there was a proviso that the shares of those creditors who did not execute it before a given day, should be paid to the insolvent; an agreement made between the insolvent and a creditor, that the latter should sign the deed, and the former pay the remainder of the whole debt, is fraudulent and void.

Jackson v. Lomas. Hil. 31 Geo. 3. 166

270. The bankrupt of the lessee is no bar to an action of covenant, (made before his bankruptcy) brought against him for rent since the bankruptcy.

Auriol v. Mills, in Error. M. 31 Geo. 3. 94

271. If after the assignment of a bankrupt's estate, a creditor residing in *England*, attach the money of the bankrupt abroad, the assignees may recover it in an action for money received to their use.

Hunter v. Potts. Hil. 31 Geo. 3. 182

272. By the assignment under the commission, all the bankrupt's property whether abroad or at home passes. *Id.*

273. If a bankrupt on the eve of his bankruptcy, fraudulently deliver goods to one of his creditors, the assignees may disaffirm the contract, and recover the value of the goods in *trover*, but if they bring *assumpsit*, they affirm the contract, and then the creditor may set off his debt.

Smith v. Hodson. Hil. 31 Geo. 3. 211

274. Where the defendant lent his acceptance to the bankrupt on a bill which did not become due till after the act of bankruptcy, and was then outstanding in the hands of third persons, yet the defendant having paid the amount after the commission issued, and before the action brought by

by the assignees, is intitled to set off the same under the words, "mutual credit," in the 5 Geo. 2. c. 30. s. 28.
Smith v. Hodson. Hil. 31 Geo. 3. Page 211

4 *Darnford and East.*

275. If A. lend stock to B. to be replaced as stock without naming any particular day, and B. become a bankrupt before any request by A. to replace the stock, A. cannot come in under B's commission, because it rested merely in damages.

Utterton v. Vernon. Hil. 32 Geo. 3. 570

Hen. Blackstone.

276. Insuring in the lottery is not gaming within the statute 5 Geo. 2. c. 30. s. 12. which prevent a bankrupt's certificate from being allowed.

Lewis v. Piercy. Trin. 29 Geo. 3. 29

277. Where a debt arising before bankruptcy had a verdict is obtained, and costs taxed after; the costs are considered as part of the original debt, and the certificate extends to both. *Ib.*

278. Under such circumstances, therefore the court will discharge a person out of custody who is in execution for the costs. *Ib.*

279. S. P. Where the action was for words spoken of a man in his trade, and the defendant became a bankrupt between the verdict, (which was for the plaintiff,) and judgment.

Longford v. Ellis. B. R. East. 25 Geo. 3. (in note) 29

280. The bankruptcy of the defendant cannot be pleaded in bar of an action of covenant for rent, on an express covenant.

Mills v. Auriol. Trin. 30 Geo. 3. 433

N. B. The judgment in this case was affirmed by the court of King's Bench on a writ of error. *Mich. 30 Geo. 3. 4 Term. Rep. B. R. 94.*

281. But such plea is good to an action of debt for rent on the *reddendum* of a lease, whether the rent be due before or after the bankruptcy. *Wadham v. Marlow. B. R. Mich. 25 Geo. 3. 437*

282. It

Hen. Blackstone.

282. It is not necessary that there should be an actual acceptance of rent by the lessor from the assignee of the lessee, to discharge the lessee from an action of debt on the *reddendum*. *Wadham v. Marlow. B. R. Mich. 25 Geo. 3.*
Page 437

283. Any assent of the lessor is sufficient for that purpose. *Ib.*

284. An action of debt on the *reddendum*, is founded not merely on the terms of the demise, but also on the enjoyment of the lessee. *Ib.*

285. Notice to the lessor of an assignment by the lessee, is not alone sufficient to exempt him from that action. *Ib.*

286. Every man's assent is presumed to an act of parliament. *Ib.*

287. The assignment therefore of a bankrupt's estate, (a lessee) being by virtue of an act of parliament, is an assignment with the assent of the lessor. *Ib.*

288. Where the defendant pleads the general plea of bankruptcy, to an action brought by an executor or administrator, and obtains a verdict, the plaintiff is not liable to costs on *Stat. 5 Geo. 2 c. 30. s. 7. Martin et ux. Administratrix of Norfolk, v. Norfolk. Mich. 31 Geo. 3.* 528

289. If after an act of bankruptcy committed, but before an assignment, a creditor of the bankrupt makes an affidavit of a debt in *England*, by virtue of which he attaches and receives after the assignment money due to the bankrupt in the *West Indies*, the assignees may recover the money in an action for money had and received. *Sill and others assignees of Skirrow v. Worswick. Trin. 31 Geo. 3.* 665

290. A bond given to a creditor of a bankrupt, in order to induce him to withdraw a petition which he had preferred to the chancellor against the allowance of the certificate, is void by the *Stat. 5 Geo. 2. c. 30. s. 7. Sumner v. Brady and others. Trin. 31 Geo. 3.* 647

Baron

Baron and Feme.

Marriage.

1. **O**UR law considers marriage in no other light than as a civil contract, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: Therefore a man cannot grant to his wife, and all compacts made between them are in general voided by the intermarriage; but a woman may be attorney for her husband, as that implies no separation, and a man may bequeath any thing to his wife by will, for that cannot take effect till the coverture is determined by his death.

1 *Black. Comm.* Page 442

Disability of *feme, causa.*

2. The disability of a *feme* to contract, arises from three circumstances. 1st, for want of power to assent, having in consideration of law no will 2d, for want of power to bind her husband. 3d, for want of property.

1 *Powell on Contracts.* 93

Holt.

Judgment against both, wife dies.

3. Judgment on *sci. fac.* against husband and wife on a judgment against her when *sole*, the wife dies, the husband is chargeable.

O' Bryan and Ram. 97—101

Release of costs in suit by *feme.*

4. The husband's releases costs obtained by his wife against another woman in the spiritual court for adultery with her husband, the wife is barred.

Chamberlain v. Hewson. 99

Judgment for both, wife dies.

5. Judgment on *sci. fac.* for husband and wife, on a judgment for her when *sole*, the wife dies, the interest survives to the husband.

Woodyeer v. Gresham. 101

Per *Holt*.—The judgment in a *sci. fac.* attached a joint interest in *baron* and *feme*, and if the husband died, it would survive to the wife, & *è contra*.

Ib.

6. The

Holt.

6. The wife may be a trespasser with her husband, and his death shall not abate the action which was brought against both. Trespass by both.

Hyde v. S. Page 101

7. The wife may commit felony along with her husband, if it be not by coercion. Felony.
Ib.

8. Where a woman executrix marries, she may make a will with her husband's consent, but not without it; so if a woman having debts due to her marries, she may make a will quoad these, and the ordinary may prove it. Will by feme.

Shardelov v. Nailor. 102

9. Though a woman lives with her husband, he shall not be charged where he finds her sufficient necessaries, and has given notice not to trust her; his assent shall be presumed, on account of cohabiting, unless the contrary appear. Baron when not chargeable.

Etherington v. Parrot. 102, 103, 104

10. If a woman take up goods, and they are pawned before they are made into cloaths, the husband is not chargeable, because they never came to his use; otherwise if they are made up and worn.

Ib. 103

11. Where a husband turns away his wife, he gives her credit wherever she goes, and must pay for necessaries for her; but if she runs away from her husband, he shall not be bound by any contract she makes. Baron turn away his wife, elopement.
Ib.

12. The husband is bound to provide the necessaries, though she be lewd, &c. unless she departs from him. Baron provd. necessaries.

Robinson v. Gosnold. 103

13. Receiving back a wife who has eloped, though but for a night, makes the husband liable to her debts. Receiving back wife eloped.
Ib.

14. Let the woman be ever so vicious, while she will cohabit with her husband, he is bound to provide her necessaries, and is liable to action by such persons as furnish her with them; but if the wife leaves the husband, they that trust her after it is notorious that she has left him, do it at their peril. Wife elope.
Ib.

- Holt.*
 Husband of
 an executrix. 15. The power of the husband to dispose of the wife's
 estate, does not make a title in him: The husband may dis-
 pose of a term which the wife has as executrix; but if he
 become a bankrupt, the commissioners cannot assign over
 this estate.
Luttrell v. Breconing. Page 104
- Id. 16. If the wife dies before the husband disposes of her
 estate, there is no title in him.
Ib. 109
- B. receive
 profits of wife's
 lands. 17. If lands are given to the wife for term of her life, out
 of which a rent-charge issues, and the husband takes the
 profits of the lands, there an action lies against him only,
 for it is brought as he is the ter-tenant, and not in respect of
 the estate.
Dillinghurst v. Spearman. 106
- Per Powell, J.*—If a man lease lands to a woman for life,
 reserving a rent, who marrieth, and the rent is in arrear at
 the death of the wife, an action will lie against the husband.
 If a feoffment be made to a married woman, and her husband
 consents to it, she may waive it after her husband's death,
 and yet an assize will lie against them both, and damages
 shall be recovered, and survive to the wife. *Ib.*
- Ad damnum
 ipsorum.* 18. Count for a battery on husband and wife, *ad damnum
 ipsorum*, is ill after verdict.
Cole v. Turner. 108
- Will of *feme*,
 husband dies. 19. A *feme covert* makes a will, then her husband dies,
 the will is not good without a republication.
Broncker v. Gobe. 246, 291
- B. and F.
 bring action;
 barth dies before
 judgment. 20. Debt due to *feme*, not altered by *baron* and *feme*
 bringing action, if not recovered in the husband's life-time,
 the wife may sue for it after; and when recovered, it shall not
 be assets of the husband.
Dupays v. Shepherd. 297
- Widow tenant
 in dower. 21. The executor of the widow, as tenant in dower can-
 not recover the same profits on a recognizance upon Stat.
 27 Car. 2, till there be a judgment for the damages.
Mordant v. Thorold. 303

Holt.

22. *Per Holt.*—A bond by the husband to the wife before marriage to provide for her, is extinguished by the marriage.
Cage v. Adon. Page 309

Bond by B. to F. before marriage.

V. Salk. 325. 1 *Ld. Raym.* 515. *v. Milbourn v. Ewart.*
5. *Durnford and East.* 381.

23. This was afterwards considered in chancery as a marriage agreement.

V. 2 Vern. 480. *Ib.*

Salkeld.

24. Action against a *feme covert* allowed good, her husband being an alien enemy, and in *France*; for a divorce shall be intended.

Baron an alien enemy.

Deerly v. Dutchess of Mazarine. 116

Besides the husband being an alien enemy, in that case his wife is chargeable as a *feme sole* as much as if he had abjured, or been banished.

Ib.

25. If *Baron* be *civiliter mortuus*, abjured the realm, &c. in such case the *feme* is considered as a *feme sole*, 1 *Bac. Ab.* 308.
(*v. Lit.* 132. *b.* 133. *a.* & *v. 2. Bl.* 1197.)

Baron civiliter mortuus.

26. The husband held liable to the wife's contract as a separate trader, &c. because they cohabit. *Per Holt.*

Langfort v. Admx. of Tiler. 113

Feme separate trader.

27. Wife cannot charge her husband after notorious separation by consent, and separate allowance.

Todd v. Stoakes. 116

Separation notorious, B. not chargeable.

28. Personal notice to tradesmen, &c. is not necessary, it is sufficient if it be publick, and commonly known.

Ib.

Notice, separation.

29. Nor is he bound by her contracts, or liable even for necessities after a notorious elopement, unless he take her again. (*Per Holt.*)

Etherington v. Parrott. 118

Not bound then by her contracts after elopement.

But if he turns her away, he gives her credit for necessities wherever she goes. *Per Holt.*

Ib.

Baron turn away feme.

30. And while they cohabit, he shall answer her contracts, &c. for by cohabiting his assent is presumed (*per eundem.*)

Ib.

By cohabiting, assent is presumed.

Salkeld.

Unless expressly
different.

31. Contra where the husband expressly dissents before hand, by notice to the owner, or his servant, (*per eundem.*)
Etherington v. Parrott. Page 118

Not liable for
materials for
clothes.

32. If she takes up materials, as silks, &c. and pawns them before made into clothes, he is not liable, for they never came to his use, otherwise if made up and worn. *Per eundem.* *Ib.*

Earnings of
feme living sole.

33. The earnings of a wife living separate, shall go to her maintenance.

Warr v. Huntly. 118

Id.

34. The case was, a working man married a woman of the like condition, and after cohabitation for some time, the husband left her, and during his absence the wife worked; and this action being brought for her diet, was held that the money she earned, should go to keep her. *Ib.*

Marriage con-
tract, mutual.

35. Action lies not on a promise of marriage, except the contract is mutual, for otherwise it was only *nudum pactum.*

Harrison v. Cage. 24

Marriage
de facto.

36. A contract of marriage *per verba de presenti*, as, "I marry you," is a marriage *de facto.*

Jeffson v. Collins. 437, 438

Spiritual court,
sentence.

37. And whether *per verba de presenti*, or *de futuro*, is cognizable in the spiritual court, and their sentence is binding. *Ib.* 437

Marriage by
layman.

38. Marriage by a mere layman is void, and a cohabitation thereupon, does not intitle the man to administration of the woman's goods.

Haydon v. Gould. 119

Id.

39. For on his demanding a right due to husbands, by the ecclesiastical law, he must prove himself husband by the same law. *Ib.* 120

Id.

40. Quere, in case of such husband's death, if it shall intitle the *feme*, and issue to a distribution. *Ib.*

Marriage, form
of pleading.

41. Note, the form of pleading a marriage, is that it was *per presbyterum sacris ordinibus constitut.* *Ib.*

42. Yet

Salkeld.

42. Yet in debt by *baron and feme, ne unques accouple, &c.* is no plea, for it admits a marriage, but denies the legality of it, and a marriage *de facto* is sufficient.

De facto.

Alleyne v. Grey. Page 437

43. Nor can the spiritual court annul a marriage after the parties are dead, because they proceed *pro salute anime*.

Marriage annulled.

Pride v. Earls of Bath and Montague. 120

44. Yet evidence at common law was admitted to bastardize a peer, even after the death of himself and parents (*durum.*)

Bastardize after death.

Ib. 120, 121

45. The husband may release costs adjudged to the wife in the spiritual court, unless a separation be, and *alimony* allowed.

Release of costs.

Chaimberlaine v. Hewson. 115

46. He alone must bring the action for work done by her during coverture, unless an express promise be made to the wife.

Express promise to B. F. joins.

Buckley v. Collier. 114

Where there is an express promise to the wife, the husband assents thereto, by bringing an action thereon.

Ib.

47. If there be nothing but a promise in law, that must be to the husband, who must have the fruits of his wife's labour. The advantages of the wife's work shall not survive to the wife, but go to the executors of the husband; for if the wife dies, her debts fall upon the husband.

Profits of work, executors of husband.

Ib.

48. (If the declaration state a promise to the husband, proof of a promise to the wife, and his agreement to it is sufficient.

Promise to husband, to wife.

Trials per pais. 430

49. (Of that which the husband may discharge alone, and of which he may make disposition to his own use, and where the husband may have the sole profit recovered, he may have an action in his own name without his wife, for the recovery.

When husband alone.

3. *Bulstrode.* 163)

50. For

Salkeld.

50. For personal things they cannot join, but for personal things in action it is in the husband's election to join the wife, or not. 4 *Vin. A.* Page 86

Where there is a wrong to the inheritance, they ought both to join. *Ib.* 88. So in debt for rent on a lease for years made to B. and F. *Ib.* 95)

Earnings of
feme separate.

51. Money earned by the wife living separate, shall go towards her own maintenance.

Warr v. Huntly. 118

Ad dampnum.

52. Trover by *baron* and *feme ad dampnum* of both, held nought after verdict; for the possession and property of the wife is vested in the husband, so that the conversion cannot be to the damage of the wife, but of the husband only.

Nelthrope v. Anderson. 114

So in trespass for taking goods,—but if the trover was before, the conversion after, they may, or may not join. *Ib.*

Id.

53. But trespass by him for imprisonment of the wife *per quod negotia viri infecta reman' ad dampnum* of both, held well after verdict.

Ruffel v. Corne. 119

Id.

54. It was objected that there being a special damage laid to the husband, the action should have been brought by him alone, but it was held good, for matter may be alledged in aggravation of damages, for which no action will lie. *Ib.*

Forbearance,
husband of *feme*,
executrix.

55. Husband of a *feme* executrix, gives a new day to the testator's debtor, who then makes a new promise, &c. he may bring *assumpsit* thereon, without joining the wife.

Tard v. Ellard. 117

* *Baron* die be-
fore recovery.

56. If he dies before recovery, she is restored to her former right, for the duty was not extinguished by the new promise,—on the other side, if the wife had died, the husband could not have sued, which is the reason her life must be averred; but notwithstanding this, the action here was well brought without joining the wife, because she was not privy to this contract, and the husband was to receive the money, and might release it, the administration being devolved on him. *Ib.*

57. (Goods

57. (Goods which feme has in *droit*, as executrix, do not go to the baron after her death, unless he be his wife's executor.

Goods of feme in *droit*.

Went. Of. of Ex. Page 86, 87

Receipt of feme executrix good. 4 *Vin.* 58.

Receipt of feme executrix.

Where feme is administratrix, they shall join, and both be named administrators. 4 *Vin.* A. 74.)

Administrators.

58. (If baron and feme jointly sue for debt due to wife before marriage, and husband dies, and wife continues the suit, the money when recovered, shall not be assets to executors of husband. *Per Holt.* 12 *Mod.*)

Executors *per* baron.

59. *F. dum sola* gives a bond, if the husband dies, his executor is not chargeable with this debt. 4 *Vin.* 123.)

Bond by feme *sole*.

60. A *sci. fa.* by baron and feme, on a judgment recovered by her, while *sole*, if after execution awarded, she dies, it survives to the husband.

Sci. fac. by both, judgment when *sole*.

Woodyer v. Gresham. 116.

See *O'Bryan v. Ram,* *Holt.* 97.

61. In an action against baron and feme, and the husband is arrested, he shall give bail for appearance both for him and his wife.

Bail for both.

Carpenter v. Faustin. 114.

But where one brings an action against husband only, he cannot declare against husband and wife. *Ib.*

62. In an action against both for a battery by the wife, while he was in prison, a declaration can't be delivered at the prison against him, & *ux*, but process must be sued against the wife, and she arrested.

Wife arrested.

Ib. 114.

63. (If he lies in prison, the wife cannot be let out on common bail. *V. 1 Vent.*)

Baron lies in prison.

64. (Coverture was not at common law so far protected as infancy, and some other disabilities (to wit) *non sana memoria*, *after la meys*, and imprisonment. *Hob.* 95.

Coverture protected.

65. (An.

Salkeld.

Action against
bo.

65. (An action which charges the husband for an act of his wife done before coverture, shall lie against both as trover on a conversion by the wife before marriage.

1 *Com. Dig.* 575. *Co. Lit.* Page 351. *b.*

Tort by both.

But an action for a *tort* done by the husband and wife jointly, shall lie against the husband alone as trover.

1 *Rol.* 348.)

Feme justify
assault.

66. The wife may justify an assault in defence of her husband.

Leeward v. Basilee. 407, 437

Husband re-
ceives rent,
living former
wife.

67. A. marries B. living a former wife, and receives her rents, &c. B. may have *indeb' assump'* as for money received to her use, the husband having no right to receive it, &c.

Haffer v. Wallis. 28

Covenant to
release guar-
dian.

68. A covenant before marriage to release the wife's guardian within two days after, set aside in equity.

Duke of Hamilton v. Lord Mobun. 158

Declare as
executors, costs.

69. If *baron* and *feme* declare on *indeb' assump'* to them as executors on a non-suit, they shall pay costs, for the cause of action arose in his time, and since the death of the testator.

Jenkins v. Plume. 207

Warrant.

70. A warrant, &c. by a *feme sole*, is revoked by her marriage after.

Anonymous. 399

Obligor and
obligee marry,
suspension.

71. Bond to pay money after marriage between the obligor and the obligee, the intermarriage only suspends, but not extinguishes the debt.

Gray v. Aiton. 325

So executrix
of obligee mar-
ries obligor.

72. *Feme* executrix of an obligee, marries the obligor, 'tis no extinguishment.

Ib. 326

Possibility re-
lease of.

73. Husband may release a duty which by possibility may accrue to the wife during coverture, otherwise not.

Ib.

Extinguishes.

74. (It was formerly doubted whether marriage was not an act of such a nature as to extinguish any contract or agreement made between the intended husband and wife previous thereto where no trustee was interposed, — but a distinction

inction was made at law between a promise which was not to be executed, until after the coverture determined, and a promise to be executed during the coverture; the former having been held not to be extinguished by the marriage, as the latter was clearly held to be so. 1 *Powell on Contracts*, 442. *Vide Hob.* 216. *Hutton* 172. *Cro.* 571, 222. 2 *Syd.* 58, 59.)

Salkeld.

75. (The husband in his life-time may dispose of all his wife's interests in chattels real by grant or demise, but she shall have them if she survives, not his executor. *Co. Lit.* 46. b. 351. a.—Husband shall not be charged after the death of his wife for a debt due from the wife before coverture, for it was only in action, 1 *Rol. A.* 351. *Cro. J.* 519.—If land of *feme* be extended for debt of *baron*, this will bind the *feme*, 4 *Vin.* 48.—Release by husband of all demands, will release a debt due to the wife, because the husband could demand it. Otherwise of release of all action, 10 *Mod.* 165.—*Baron* had a term in right of his wife, and only took a covenant for further assurance, and it was adjudged that this altered the property, 4 *Vin.* 51 —*Baron* assigns goods which his wife has as executrix, in trust for such uses, as he by deed or will shall appoint; this alters the property. 2 *Vern.* 287.)

1 Lord *Raymond.*

76. The wife of an alien enemy living here as a *feme sole*, may contract.

Alien enemy.

Derry v. Dutchess of Mazarine. 147

See Holt.

77. Husband may bring *trover* for money paid by the wife for a purchase without his agreement.

Trover for purchase money.

Granby v. Allen. 224

Trespass lies against husband and wife for the trespass of both.

Trespass of both.

White v. Eldridge. 443

78. (Trespass for entering plaintiff's house, and taking goods, plea that he entered by permission of plaintiff's wife, and took them, adjudged ill; for the wife could give no permission.—*Taylor v. Fisher.* *Cro. El.* 245)

79. Separation or elopement will discharge the husband from the contracts of his wife, tho' the tradesman has no notice of the elopement.

Elopement, separation, notice.

Todd v. Stokes. 444
It

† Lord Raymond.

It is sufficient for the husband to give general notice that people do not give credit to his wife.

Todd v. Stokes. Page 444.

If he turns away his wife he gives her general credit for necessities. *Ib.*

Bond, intermarriage.

80. A bond given to a woman with condition to leave her a sum of money, not released by intermarriage.

(*Holt. contra.*)

Cage v. Aiton. 515

Feoffment.

81. A feoffment by a husband *de facto* is a discontinuance, notwithstanding a subsequent divorce. *Ib.* 521

Husband *de facto*.

82. (Marriage *de facto* is sufficient to make baron liable. *And. 227.*)

Feme seals bond, sale by *feme*.

83. (If a woman seals a bond in her husband's presence, and he stands by it shall bind him. 4 *Vin. A.* 119. *Freeman*, 215.—Sale by *feme* good, and baron shall declare that he himself sold. *Bul. 90.*)

2 Lord Raymond.

Notice not to trust.

84. A husband who provides sufficient clothes for an extravagant wife is not answerable for clothes bought by her of a tradesman whom he has warned not to trust her.

Etherington v. Parret. 1006.

Necessaries, evidence of contract.

85. (When things come to the use of the husband or his family were necessary, or that he was absent, it is evidence of a contract to bind the husband, but not conclusive evidence.—*Gil. E.* 181.)

Beating wife and servants, *per quod*.

86. Trespass by the husband alone for entering his house and beating his wife and servants, whereby the business of the plaintiff remained undone; and judgment for the plaintiff.

Ruffel v. Corne. 1032

87. Judgment was given by *Eyre* and *Rokeby*, *dubitante Holt*; for they held that the *per quod* went through the whole count, *Ib.*

Beating wife, &c.

88. Trespass by husband and wife for beating the wife, and also for beating the wife, whereby the business of the husband

husband remained undone, and concludes *ad damnum ipsorum*, and judgment for the plaintiffs.

Ruffel v. Corne. Page 1031

Lord Raymond.

89. An action of trespass may be for a matter jointly with others, which could not be maintained singly. *Ib.*

90. (Where action survives, *ad damnum ipsorum*, is good. *Ad damnum ipsorum.*
11. N. P. 7.)

91. (If wife dies of the battery, the baron cannot have an action on the case, because it is criminal and of an higher nature. *4 Vin. 74.*)

92. A man recovers judgment against a *feme sole*, and he recovers award of execution in a *scire facias*, against the husband and wife, the wife dies, he may have a *scire facias* against the husband, and *vice versa*.

Treviban v. Lawrence. 1050

93. Husband and wife cannot join for a battery committed on them both, because the wife cannot be joined in an action with the husband for the battery of the husband.

Newton v. Hatton. 1208

94. An action for a battery on the wife must be *ad damnum ipsorum*, the damages in such case surviving to the wife. *Damage survives, ad damnum.*
Ib. 1209

Strangers.

95. *Baron* and *feme*, may or may not join at their election in an action for rent of the wife's land, as where a bond is to both of them. *May, or may not join.*

Alcherry v. Walby. 229

96. (*Feme* shall join in no action, but what will survive to her or her administrator after the death of the husband. *When join.*
1 Sider. 224.)

97. The husband alone may sue for malicious prosecution of the wife, *per quod* he was put to expence. *Malicious prosecution of wife.*
Smith v. Nixon. 977

Per Cur. It is laid here that the husband was put to expence, and this being an action founded on a *tort*, the plaintiff was not bound to prove all the declaration, as he is

is in the case of contracts, and tho' this action may survive to the wife, yet that is no reason, for he may undoubtedly maintain trespass for beating her, *per quod consortium amisit*, and yet no doubt the action for beating will survive.

Smith v. Hixon. Page 977

Strange.

Escape, debt
to wife.

98. They shall join in action for the escape of one in execution for a debt to the wife.

Huggins v. Durham. 726

Marriage not
controvertible.

99. In action by husband and wife, defendant not allowed to controvert the marriage on the general issue, but it may be pleaded in abatement.

Dickenson v. Davis. 480

Beating wife.

100. Trespass for entering the plaintiff's house, and beating his wife.

Dix v. Brookes. 61

101. It was objected the wife should have joined, for otherwise she might have her action, and so the defendant be doubly charged, but *per cur.*—plaintiff may join that in his declaration for which he singly could not recover, and the party injured have his separate action, as in the common case of trespass for beating a servant, *per quod servitium amisit*, both master and servant may recover. (v. *Salk.* 642.)
Ib.

Necessaries
for wife.

102. Meat and drink found for the wife, being separate as a boarder in plaintiff's house, not allowed in evidence as found for the husband.

Ramsden v. Ambrose. 127

103. For tho' the husband is chargeable on his implied contract for necessaries for the wife, and therefore if goods are delivered to her, the vender may declare generally for goods sold and delivered, yet in this case the plaintiff fails in his description of the subject matter of the contract, a recovery in this action could not be pleaded to a special action for meat and drink found for the wife.
Ib.

Elopes.

104. Where a wife goes away with an adulterer, the husband cannot be charged for necessaries.

Morris v. Martin. 647

105. Husband

Strange.

105. Husband not chargeable for goods sold to an adulterous wife.

Goods sold to her.

Manwairing v. Sands. Page 706

106. What elopement prevents the husband's being charged with debts contracted by the wife.

Elopement.

Child v. Hardyman. 875

107. In this case the wife eloped—the husband did not absolutely refuse to receive her again, which might have been from that time an answer to the elopement, but said if she returned she should be kept in a garret; if a woman elopes from her husband, tho' not with an adulterer, or in an adulterous manner, the husband is not bound. *Id.*

Elopement not with adulterer.

108. A woman during coverture, gave a note of hand for a sum of money, it was adjudged to be not voidable, but absolutely void and cannot be set up, tho' after her husband's death she promised to pay it.

Note by feme, void.

Loyd v. Lee. 94

109. If a note is made to a *feme covert*, she cannot indorse it, for the right is vested in the husband, and the wife has no power to dispose of it.

Feme cannot indorse.

Connor v. Martin. 516

110. The husband not chargeable for necessaries for the wife at a spunging house when she is committed for an offence, for her being there was illegal, she being such a prisoner as was not entitled to the benefit of the rules, and the law will not in such case raise an implied promise.

Wife committed to custody for offence.

Fowles v. Dinely. 1122

111. A husband who turns away his wife without cause, and refuses to provide for her, cannot make a particular prohibition.

Baron turns her away, cannot forbid to trust.

Bolton v. Prentice. 1214

In the case of *Manby v. Scott*, 1 Sid. 109. the wife was guilty of the first wrong in eloping.

112. Wife witness on behalf of defendant to prove goods delivered on husband's credit, the goods were the wedding clothes of the daughter furnished on the credit of the father; to prove this, the mother who was present at chusing the goods was called to charge her husband.

Wife witness for defendant.

Williams v. Johnson. 504

113. Declaration

*Strange.*To prove
nursing a child.

113. Declaration of wife, evidence against her husband in an action for wages for nursing a child, such matter being usually transacted by women.

Anonymous. Page 52*Feme de facto,*
trespass against
baron.114. Wife *de facto*, may maintain trespass against husband.*Westbrook v. Strutville.*115. The defendant in this case gave in evidence his marriage with the plaintiff, to encounter which she proved former marriage to one *Westbroke*, who was alive at the time of the second marriage.—Verdict for plaintiff, her marriage with defendant being void, *ab initio*.*Feme a servant*
to baron.

116. A woman marries a second husband living the first and the second not privy, she is to be esteemed as a servant to the second husband, who is entitled to the benefit of her labour during the cohabitation.

*Strutville v.**Baron cannot*
stop proceedings
in spiritual
court.

117. Husband cannot stop the wife's proceedings in spiritual court for defamation.

Tarrant v. Mawr. 57118. (*Feme* may administer without the assent of baron *Perkins v. Grant.* 7.)Coverture
after action
brought.

119. Coverture of the defendant after the action brought, cannot abate the plaintiff's writ.

King v. Jones. 811Will by *feme*,
baron admini-
stration.120. Though the *feme* has power to make a will, yet the baron shall have administration, 891,—1118. but not where he has departed with all interest in her estate.*The King v. Bettsworth.* 1111*Feme taken in*
execution.

121. Married woman taken in execution, not discharged without appearance of collusion.

Pitts v. Meller. 1167Debt *deus Ala.*122. A wife arrested on mesne process for her debt, *dam sola*, discharged—husband must lie in custody till he puts in bail for both.*Harrison v. Bearcliffe.* 1272

123. (V. 1. Wds. 149.—D. & E. 486. 2 Bl. 720. and Cro. J. 323.)

124. A

Strange.

124. A husband has not power to confine his wife without cause.

Power to confine.

The King v. Lister. Page 478

125. *In usum suum proprium converterat*, is not ill in trespass against baron and feme.—in *Salk.* 114. it is held that the feme could not convert to her own use, but (*par curiam*,) this being trespass, it is well enough for the conversion, here is not the gist of the action, as it is in *trover*, this action being maintainable for entering the house and taking the goods, and the court must take it, the damages were given only for that, as where words are joined that are not actionable. (v. 10 Co. *Osborne's case*, & *Gro. J.* 665. & *Salk.* 119. & 1 *Vent.* 45.)

In usum suum proprium, in trespass.

Shalley v. Herford. 1094

126. *Trover* for a conversion by the wife during coverture held good, for though a feme cannot contract for goods, or be charged for them, she may convert them.—4 *Vim.* 93. cites *Nox.* 79. *Lat.* 126. but this is when the tort is in the feme only, as in *trover* for barley if she bakes it into bread and eats it herself, but *trover* and conversion generally against baron and feme, and conversion to their own use is bad, for presently by the conversion of the feme, it is to the use of the baron. 4 *Vim. A.* 93.—debt does not lie against baron and feme, on contract made by them, nor covenant against baron and feme, on covenant made by them by deed indented, nor debt on obligation by both. 4 *Vim. A.* 93.

What actions against both.

Hardwicke.

127. Husband bound to give security to keep the peace towards his wife.

Baron keep the peace.

King and Brotherton. 69

128. Held by Lord *Hardwicke*, the wife was a good witness to prove the child a bastard, and that he was not got by her husband, by reason of the nature of the fact being carried on in secrecy, and the necessity of the thing; but that she was not a good witness to prove that her husband resided at a distance from her, and want of access.

Feme prove bastard, not want of access.

King and Reading. 77

129. For this may be proved by other witnesses, and therefore the wife shall not be admitted to prove it, since there is no necessity that can justify her being an evidence in this cause.

Id.

130. (The

Hardwicke.

Feme, treason of husband.

130. (The wife is not bound to discover treason of the husband, but the son is of the father.

Gill. E. Page 181)

131. The court will not allow the husband to sever from his wife, though the demand relates to an estate she has separately, and in her own right.

Gordon v. Halpen and Wife. 93

In general no joint property in chattels.

132. Generally speaking, husband and wife cannot have a joint property in chattels, for the marriage amounts to a gift to the husband.

Bearn v. Mattaire. 111

If jointly possessed before marriage, join in replevin.

133. But if the husband and wife were jointly possessed of chattels before marriage, and the goods were distrained, they may join in replevin, and it shall be so taken after an avowry, and verdict where the replevin is brought by husband and wife to the damage of them both. *Ib. 111, 112*

So in trover.

134. So in *trover*, if the *trover* was before marriage, the action may be brought either way. *Baltimore and ux. et Gremes. 1 Vern. 260. Bearn and ux. et Mattair.*

Gift of goods by feme.

135. (Gift of goods of *baron* by *feme*, is good, unless he disagrees to it. 4 *Vin. 60.*)

Feme not witness for or against baron.

136. Lord *Hardwicke* refused to let the wife be examined as a witness, either for or against her husband, though the parties consented, for the reason of the law is to preserve the peace of families.

Barker and Sir Woolston Dixie. 252

Punishment of feme.

137. The punishment of the wife convicted of keeping a disorderly house, not postponed on account of the husband's absence.

King and Thomas, &c. Ib. 264

Wilson.

Adultery, not want of access.

138. The *feme* may be admitted to prove the fact of adultery committed by herself, but not to prove that the *baron* had no access.

The King v. Rook. 340. Vol. 1:

Assault of feme, baron and feme taken.

139. *Baron* and *feme* both taken in execution, in an action for the assault of the *feme*.

Langstaff v. Rain. 149. Vol. 1:

140. (Other-

Wilson.

140. (Otherwise in *mesne process*. *Str.* 1272. 1 *D.* & *E.* 486. 2 *Bl.* 720.)

141. Whenever the suit will survive to the wife, she must join in action. *Baron and feme join.*

Dunstan v. Burwell. 224. V. 1.
(V. 2. *Bulf.* 14.)

142. A judgment confessed to a *feme covert*, is void, and so is her bond. *Judgment and bond to feme void.*

Roberts v. Pierfon. 3. Vol. 2

143. Debt upon a bond by the wife, *dum sola*, she and her husband are outlawed, and goods sworn to be her separate goods, taken in execution, the law adjudges them to be the goods of the *baron*, and if she has any equitable right, she must seek relief in a court of equity; outlawry set aside as to wife. *Separate goods of feme taken in execution.*

Biscoe v. Kennedy. 127. V. 2

144. A promissory note being payable to a *feme sole*, or her order, she marries, it becomes her husband's property, and she cannot indorse it over while she is *covert*. *Cannot indorse note.*

Rawlinson v. Stone. 1. V. 3

145. Husband and wife after judgment, were rendered to prison in discharge of their bail, and not being now charged in execution, but really in prison for want of bail to the first process, the wife was discharged upon motion, as being in custody on *mesne process*, but if they had been charged in execution, she could not have been discharged. *Both charged in execution.*

Anonymous. 124. V. 3

146. A man possessed of a term for years, in right of his wife; as executrix of her former husband, has power to grant and convey the same. *Husband of feme executrix.*

Thrustout v. Coppin. 277. V. 3

147. An *indebitatus assumpsit*, for money lent to the wife, at the request of the husband, is a good count. *Money lent to wife.*

Stephenson v. Hardy. 388. V. 3.

Blackstone.

148. A wife in *London* may be a sole trader, and liable to a commission of bankrupt. *Feme sole trader.*

La Vie v. Philips. 570

2 *Blackstone*.

Husband of
feme executrix.

149. A husband who marries a *feme* administratrix, may surrender or dispose of a term, which she has in that right. *Thrusout* on the demise of *Levick* and *Coppin*. *H.* 12 *Geo.* 3. 801. (but she shall have it if she survives. 1 *And.* 21. *Dyer* 331. a.)

Trust estate
in *feme*.

150. (A man marries a woman who has a term for years settled on her in trust, the husband may as well dispose of the trust, as if the legal interest was in her. 1 *Vern.* 7. 18. 2 *Vern.* 270. *Eq. Abr.* 58. vide *Co. Lit.* 46. b. 351. a.—An express condition is annexed to the estate of a woman who takes husband, the latches of the husband to perform the condition, loses the estate for ever. *Co. Lit.* 246. b.)

Feme cannot
be sued alone,
tho' elope.

151. A *feme covert* eloping from her husband, and running in debt, cannot be sued alone.

Hatchet v. Baddeley. *E.* 16 *G.* 3. 1079

152. *Per de Grey, Ch. J.*—The word elopement is not a legal term, nor has it any express meaning in the law.—The woman who elopes, or departs from her husband's house, without his consent, is in every view, (except adultery be proved,) a *feme covert*, and as such can neither sue, nor be sued alone: This is the general law; the exceptions are local customs, as in the city of *London*, where a *feme covert* being sole trader, may be sued; but there the husband must be joined in the action at the out set for conformity. 2. The wife of an exile, or one dead in law. 3. The wife of a person whose husband lives abroad, as in the duchess of *Mazarine's* case, where a divorce will be presumed;—but no act of the wife will make her liable to be sued alone. *Il.*

Or having se-
parate main-
tenance, or sole
trader.

153. A woman parted by consent, and having a separate maintenance, cannot be sued without joining her husband.

Lean v. Schutz. *E.* 18 *Geo.* 3. 1195

154. Nor *feme* sole trader. *Il.*

Interest of
feme stated.

155. Husband and wife cannot join in *assumpsit*, without stating the interest of the wife.

Bidgood v. Way and Wife in error. *Cam. Scacc. M.* 19 *Geo.* 3. 1236

156. *Per*

2 *Blackstone.*

156. *Per Curiam.*—No contract can be made with a married woman; no promise either express or implied, gives any interest to her; the whole results to the husband, and the action must be brought in his name only; the remedy, if the contract be his, goes after his death to his administrator, if a joint contract, it survives to the longest liver of husband and wife.—The cases where the wife is sometimes joined, are exceptions which prove the rule, they only shew that the husband may assent to give the wife an interest in the contract, and may join her in the action.

Bidgood v. Way, &c. Page 1236

157. *Feme covert* in custody on *mesne process*, shall be discharged on common bail.

Feme in custody, mesne process.

Roberts v. Andrews. 720

158. (On all judgments obtained on the wife's contracts, or for her torts committed during *coverture*, the writ shall go against the husband alone. *Cro. Ca* 513.)

1 *Burrow.*

159. A husband and wife are considered as one, in matters of evidence, and cannot be witnesses the one for the other; the husband cannot be witness for his wife, in a question concerning her separate estate.

Cannot be witness for, or against.

Windham v. Chetwynd. 424

160. The will of a *feme covert*, made under an agreement with her husband previous to marriage, giving her power to make a will, must be proved in the spiritual court, though it operates as an appointment, and legacies appointed under it shall lapse; so it has been settled in chancery, but the spiritual court cannot treat it as a will, by granting strict probate of it.

Will of *feme*,

spiritual court, no strict probate.

Jenkin v. Whitehouse. 431

161. However they may grant administration with such appointment annexed, which proves it to be testamentary. *Ib.*

And attended with all the consequences of a will. *Ib.*

162. First, the fact, "That the paper was actually her will," must be established by the ecclesiastical court. *Ib.*

K 2

163. Secondly,

1 *Burrow.*

As to her
power a ques-
tion of law.

163. Secondly, but if the question turns upon her power to make it, that question must be discussed in the common law court, and if she had no such power, then a prohibition shall go.

Jenkin v. Whitehouse. Page 433

Articles of
separation.

164. *Baron and feme* separated by articles of agreement made in consideration of money received by the husband, and with covenant "never to disturb his wife, or any person with whom she should live."

Id.

165. 1st. The husband cannot seize her, or force her to live with him.

The King v. Mead. 542

2d. Such an attempt would be a breach of the peace.

Id.

3d. And a contempt of court, if molested in her return from thence, being brought up by a *habeas corpus*.

Id.

4. *Burrow.*

A voluntary pension from the crown during pleasure, shall not excuse the husband from being liable to be sued by her creditors, by whom she was supplied with necessaries.

Thompson v. Hervey. 2177

Cowper.

Re-delivery
of deed after
death of *baron*.

166. Re-delivery by *feme*, after death of *baron*, of a deed executed by her whilst under *coverture*, is equivalent to a new grant, and binds her without being re-executed, or re-attested, and circumstances alone may amount to a re-delivery, though the original deed were a joint deed by *baron* and *feme*, affecting her land, and no fine levied.

Goodright v. Straphan. 201

Feme deny
marriage, claim
separate pro-
perty.

167. After a solemn declaration by a woman, that she was married to a man, and that goods (in his possession), were his goods in her right; she shall never be allowed to say (at least against creditors), that she was not married to him, and that the goods were her sole property.

Mace v. Cadell. 233

168. In

Douglas.

168. In action of covenant by the husband of tenant in fee, he must declare on a *seizin* in their demesne as of fee in himself and his wife, in right of his wife. Seizin in their demesne as of fee, &c.

Polyblank v. Hawkins. Page 314 to 316

169. If he declare on a *seizin* in his demesne as of freehold in right of his wife, it will be bad on a special demurrer. Id. not as a freehold, &c.

Ib.

It is a fault in form, to depart from the established practice of stating the exact title. *Ib.*

170. The husband cannot have execution for the costs on a plea of *coverture* found for the defendant, without a *fiat facias*. Costs.

Wortley v. Rayner. 614, 615

171. A *feme covert* is capable of purchasing of others, without the concurrence of her husband, subject to his disagreement, which will divest the estate. Feme capable of purchasing.

Barnfather v. Jordan. 435

172. Hence in covenant for rent against an assignee, an assignment over before the rent accrued, is a good plea, though the plaintiff reply that the assignee over is a *feme covert*. Assignment to feme.

Ib.

173. A *feme covert's* will of personal estate, authorized by a power in a marriage settlement, cannot be given in evidence, till proved in the ecclesiastical court. Feme will of personal estate proved.

Stone v. Forsyth. 681, to 683

Darnford and East.

174. A *feme covert* living apart from her husband, and having a separate maintenance, may contract and be sued as a *feme sole*. Separate maintenance, feme sole.

Corbett v. Poehnitz et ux. 5

175. Lord Mansfield.—The facts lie in a narrow compass. Lord and lady Percy by a deed mutually agree to live separate; neither can break this agreement; and large maintenance is settled on her, for her own private separate use, as a *feme sole* to all purposes. She applies to the plaintiff, he considers her as a *feme sole*, and becomes security for her.—The general rule is, that a married woman can have no property, and that her contracts are universally

verfally void ; but then as the times alter, new customs and new manners arife, and thefe occasion exceptions ; and in modern days deeds have been allowed, under which a married woman affumes the appearance of a *feme sole*, and is to all intents and purpofes capacitated to act as fuch.

Corbett v. Poelnitz et ux. Page 5

Per Afbhurft, J.—The difabilities of a *feme covert* are, firft, from want of property, and fecondly, becaufe it would be unreafonable to permit the wife to affect the property of the husband, except where he will not allow her neceffaries, and when the incapacity from want of property, is once removed, fhe is fuable for all contracts. (V. 4 D. & E. 766)
Ib.

She aliens the whole.

176. *Feme* continues liable, notwithstanding fhe aliens the whole again. *Ib.* 10

Baron not liable for neceffaries.

177. In fuch cafe the husband is not liable, even for neceffaries.

Baron in exile.

178. Where credit has been given to the wife of a man in exile, fhe alone is liable. *Ib.* 8

Baron abjured the realm.

179. So where the husband has abjured the realm. *Ib.*

Transported.

180. So where he is transported. *Ib.* 9

Feme, feparate eftate.

181. Where a married woman has a feparate maintenance, and acts and receives credit as a *feme sole*, fhe fhall be liable as fuch. *Ib.*

Second husband, debts by wife.

182. A fecond husband is liable for debts contracted by his wife, while fhe was living in a ftate of feparation from her firft husband, and had a feparate maintenance. (*Lady Percy* in this cafe, had married *Baron Poelnitz*.) *Ib.* 5

Writ againft both, *feme* difcharged.

183. A *feme covert* was difcharged out of cuftody, becaufe fhe was arrefted without her husband, though the writ was fued out againft both, on which *non eft inventus* was returned, as to the husband ; for *feme covert* has no property, and if arrefted, might be imprifoned for life.

Edward's v. Rourke et ux. 486

(See *Salk.* 115.—2 *Bl.* 903.)

184. Husband

2 *Durnford and East.*

184. Husband and wife shall not be called in any case, to give evidence even tending to criminate each other.
The *King*, v. the inhabitants of *Cliviger*, Page 263

Cannot criminate each other.

185. In a case of settlement where a marriage in fact had been proved between two paupers, the first wife of the husband is not a competent witness to prove a former marriage with him, because such evidence shews him to have been guilty of bigamy. *Ib.*

Marriage in fact, bigamy.

186. Husband and wife may prove their own marriage, on a question of settlement. *Ib.*

Proof of marriage.

3 *Durnford and East.*

187. A woman may before marriage, with the consent of her intended husband, convey all her stock in trade and furniture, to trustees, to enable her to carry on her business separately; and if the husband do not intermeddle with them, and there be no fraud, such effects though fluctuating, are not liable to his debts. *E. 30 Geo. 3.*
Farman v. Woollaton, 618

Woman before marriage convey to trustees for sole trade.

188. But whether the trade be carried on solely by the wife, or jointly with the husband, is a question of fact for the jury; and if they determine the latter, the stock in trade may be seized by the assignees of the husband, if he become a bankrupt under 21 *Jac.* 1. c. 19. *Ib.*

Sole trader, question for jury.

189. But even in such case, the furniture is not liable, though removed to the husband's house. *Ib.*

Furniture not liable.

190. It is no objection by creditors to such settlement, that there is no inventory of the goods intended to be thus settled. *Ib.*

Inventory of goods.

191. The question in all such cases is, whether the possession is consistent with the deed. *Haselinton v. Gill*, *Tr.*, 24 *Geo.* 3. *Ib.* 629

Possession consistent with deed.

192. And where the cows on a dairy were so settled, the wife was also held entitled to the increase, and produce arising therefrom. *Ib.*

Id.

193. An action of trespass for an injury done to the property of the wife, *dum sola*, should be brought by the husband and wife; but if such action be brought by the wife alone,

Coverture in abatement, not in bar.

alone, the defendant must plead the *coverture* in abatement, and not in bar.

Milner v. Milnes. E. 30 Geo. 3. Page 627

Chose in action.

Per Lord Kenyon.—It is clear that marriage gives the husband all the personal estate which the wife has in possession; it is also clear on the other hand, that where a *chose in action* of the wife is to be reduced into possession, and it is necessary to bring an action for that purpose, it must be brought in the names of both husband and wife. *Ib.*

4 *Durnford and East.*

Maintenance of child by former husband.

194. A husband is not bound to maintain a wife's child by a former husband. *Tubb v. Harrism.* Mich. 31 Geo. 3. 118

Feme, sole trader must join with *baron*.

195. A *feme covert* cannot sue without her husband, a sole trader by the custom of *London* in the superior courts at *Westminster*. *Caudell v. Shaw.* Trin. 31 Geo. 3. 361

Feme cannot give warrant to confess judgment.

196. Where a *feme covert* sole trader gave a bond and warrant of attorney to enter up judgment, on which the plaintiff afterwards took out execution, the court set the judgment aside, as entered up without authority, on the motion of the assignees of the wife, (who had become a bankrupt), with the consent of the husband, which was also entered in the rule; for a married woman cannot be made debtor without her husband, and therefore she cannot give such warrant without her husband. *Read v. Jenson.* Hil. 13 Geo. 3. B. R. cited. 362

197. A *feme covert* living in adultery, and separate from her husband, cannot be sued as a *feme sole*; if she have no separate maintenance.

Gilebrist v. Brown. 766

(*v. Corbett v. Poelnitz.* 1 D. & E. 5.)

Bond to *baron* and *feme* administratrix.

198. If a bond be given to husband and wife administratrix, the husband alone may declare on it, as on a bond made to himself. *Ankerstein v. Clarke.* E. 32 Geo. 3. 616 (V. 1 *Strange* 229.)

Per Lord Kenyon.—The husband may reduce all the assets into possession, and will only be liable on a *devastavit*; if he does not pay the debts of the intestate. *Ib.*

Husbands and wives cannot in any case be witnesses either for, or against each other.

Davis v. Dinwoody. 678

199. Where

Hen. Black.

199. Where the defendant is joined with his wife in the writ, he may enter an appearance for himself only.

Appearance
for feme only.

Clark v. Norris at ex. East. 29 Geo. 3. Page 235

200. And in such case the plaintiff cannot sign judgment for want of a plea, without demanding a plea.

Id.

Ib.

201. The wife can only join in bringing the action, when she is the meritorious cause of action, as where a legacy is left to her.

When join.

Rose v. Bowler. 113

202. Counts in which the husband is entitled in right of his wife, cannot be joined with others in his own right.

Ib.

In this case, though in the first count the legacy appeared to have been left to the wife, yet there was no meritorious consideration on her part for the three last promises which were on general money counts.

Ib.

203. When a married woman lives apart from her husband, under articles of separation, by which he covenants, "that she shall enjoy to her own use, all such estates both real and personal, as shall come to her during the *cover-*
ture, and that he will join in the necessary conveyances, to limit them to such uses as she shall appoint." And copyhold lands having afterwards descended to her, the husband again covenants in the same manner as before, and "that he will join in surrendering such estates, to such uses as she shall appoint." The wife may surrender those copyhold lands, without her husband joining, and without any special custom of the manor to authorise such surrender.

Articles of separation.

Compton v. Collinson. Hil. 30 Geo. 3. 334

204. A. being possessed of a term of nine hundred and ninety-nine years, previous to his marriage with B. granted the term to "B. and her heirs, immediately after the death of A. to hold the same to the said B. and her heirs and to her and their own proper use for ever." The marriage took effect, A. survived B. and died without issue intestate, and without having taken out administration to B. his wife, the term upon the death of A. went to his administrator, not to the administrator of B. *See on Dem. of Roberts v. Polgreen. Hil. 31 Geo. 3. 535*

Term granted
previous to in-
termarriage.

205. Where

2 *Durnford and East.*

Consignor
goods in transit.

8. The consignor may stop goods *in transitu*, before they get into the hands of the consignee, in case of the insolvency of the latter; but if the consignee assign the bills of lading to a third person, for a valuable consideration, the right of the consignor as against such assignee, is divested.

Lickbarrow v. Mason. Page 63

Indorsement.

9. There is no distinction between a bill of lading indorsed in blank, and an indorsement to a particular person. *Ib.*

Consignee,
assignment.

10. But if the consignee to whom the bill of lading is indorsed in blank, assign it over as a security for acceptances given by the assignee, not amounting to the value of the goods, and afterwards by an agreement between them, they become partners in the goods, by which agreement it appears that the consignor has not been paid for them, the assignee of the bill of lading cannot maintain *trover*, against the consignor, if he stop the goods *in transitu*, upon the insolvency of the consignee.

Salomons v. Nissen. 674

Assignment,
bankruptcy.

11. An assignment of goods at sea, as a security for a debt, and a subsequent indorsement of a bill of lading, are good, as against the assignees of the assignor, who committed an act of bankruptcy between the assignment of the goods, and the indorsement of the bill of lading.

Lempriere v. Pasley. 485

3 *Hen. Blackstone.*

Consignee,
insolvent stop
in transit.

12. Where consignee of goods becomes insolvent, the consignor may stop them *in transitu*, before the consignee gains possession, though the consignee has assigned the bills of lading to a third person, for a valuable consideration.—*Mason and others, v. Lickbarrow and others*, in the exchequer chamber, in error.—*H. 30. Geo. 3.* 357

N. B. A writ of error on the judgment of the court of Exchequer chamber in this case, is now depending in the house of Lords.—*Mich. 32 Geo. 3.*

Evidence of
contract.

13. A bill of lading is the written evidence of a contract for the carriage and delivery of goods sent by sea, for a certain freight. *Ib.*

The indorsement of a bill of lading is an assignment of the goods themselves, and differs essentially from the indorsement of a bill of exchange. *Ib.*

A bill

Hen. Blackstone.

A bill of lading though assignable, is *not negotiable*, by the custom of merchants.

Lempriere v. Pasley. Page 485

Esplanade's Cases at N. P.

14. When goods are shipped to the order of the shipper, the custom of charging the person in whose name goods are entered at the custom-house with the freight, can only exist where the same person is consignee, or where the consignee is unknown. Freight.

Artaxa v. Smallpiece. 23

Bills and Notes.

1. **A** BILL of exchange is an open letter of request from one man to another, desiring him to pay a sum named therein, to a third person on his account.

- *2 Blac. Com.* Page 466

Protest.

2. Protest for non-payment, or non-acceptance, must be notified within fourteen days after to the drawer. *Ib.* 469

Promissory
note.

3. The law considers a promissory note in the light of a bill drawn by a man on himself, accepted at the time of drawing. *Ib.* 470

Holt.

Simple con-
tracts.

4. Are but simple contracts.

Yeoman v. Bradshaw. 42

Bona notabilia.

5. Are *bona notabilia* where.

Ib.

6. Any person who will draw a bill of exchange, is a trader for that purpose.

Wetherly v. Sarsfield. 112, 113

Foreign bills

7. Of foreign bills when to be tendered, accepted, protested.

Mogadara v. Holt. 114

Without pro-
mise.

8. Action on the case lies on a bill of exchange, without a promise, but when such promise is laid, it is material.

Fielding v. Serrat. 27

Indorsement,
effects of.

9. An indorsement determines the right and interest in the money of him that makes the indorsement.

- *Cramlington v. Evans.* 109

When pay-
ment.

10. A bill shall be deemed payment, if the party taking it does not within convenient time resort back to the drawer for his money.

Darrach v. Savage. 113

His

Holt.

11. His keeping the bill long, is evidence that he thought the merchant good at the time, and agreed to take him for his debtor.

Darrach v. Savage. Page 113

12. The drawer is liable, though the acceptance was after the day. Acceptance after day.

Mogadara v. Holt. 113

Per Holt.—The drawer is chargeable for the value received, and though the money were not paid, or the bill presented within the time mentioned, yet it ought still to be paid; but if the party do not tender and protest at the day, and there be a break in the mean time, of the person on whom the bill is drawn, he loseth his money; otherwise if no particular damage. *Ib.*

13. A bill of exchange is not negotiable, if drawn payable to A. B. or bearer; it ought to be or order. Bearer or order.

Steward v. Hodges. 115

14. A man may draw a bill of exchange in favor of himself or his order, without the intervention of a third person. Without third person.

Butler v. Crips. 119

15. The indorsee cannot recover against the indorser, without a default of payment in the drawer. Default of drawer.

Anonymous. 115, 117

16. An indorsement is a conditional warranty of the bill, and makes a new contract, in case the person on whom it was drawn, do not pay it. Indorsement, conditional, warranty.

Lambert v. Oakes. 117

17. The plaintiff must prove he demanded, or endeavoured to demand his money of the drawer, or drawee, to enable him to sue the indorser. Demand.

117, 118. *Ib.*

18. A blank indorsement gives the indorsee power to fill it up. Blank indorsement.

Ib. 117

19. In an action against the indorser, it is not necessary to prove the drawer's hand, for though it be forged, the indorser is liable. Hand of drawer.

Ib. 118

20. The *bona fide* possessor of a bill for valuable consideration, shall maintain his property against one who lost it. Bill lost.

Anonymous. *Ib.*

21. A pro-

Holt.

21. A protest on a foreign bill, was part of its constitution, but on inland bills, it is only necessary by the *Stat. 9 & 10 Will. 3.* to give damages or interest.

Boroughs v. Perkins. Page 121

Notice, non-payment.

22. Convenient notice of non-payment must be given to the drawer of inland or foreign bills, by the person to whom it is payable.

Ib. 121

Protest.

23. The want of a protest on an inland bill, does not take away the action. *Ib.*

A protest is never set forth in the declaration. *Ib.*

Bill when a payment.

24. Where a note on a third person is given as payment, and taken absolutely, yet if the party giving it knew the third person to be in a failing condition, and the person to whom it is given use due diligence to get payment, but cannot, this is a fraud, and therefore no payment.

Popley v. Asbley. 121, 122

25. Bill of exchange may be accepted by parol.

Dupays v. Shepherd. 297

Salkeld.

Indorsee of part of sum.

26. Indorsee of part of a sum in a bill of exchange, cannot bring an action, without shewing the other part to be satisfied.—For *per Holt*, where a man's contract has subjected him only to one action, it cannot be divided so as to subject him to two.—An entire contract cannot be divided.

Hawkins v. Cardee. 65

(*V. 2 Wils.* 262.—*Hen. Bl.* 88.)

Notice, non-payment.

27. At common law the drawer was not chargeable, unless he had notice of the drawee's non-payment in convenient time.

Allen v. Dockwra. 127

28. And convenient time is to be guided according to the usage of traders, and particular circumstances of cases.

Hill v. Lewis. 133

29. Yet where A. indorses, and delivers a bill to B. who keeps it by him long after payable, if not paid, he may have *assumpsit* against A.

Clark v. Mandall. 124

30. And

Salkeld.

30. And the indorsement, delivery and detainer, is no evidence that B. accepted it as so much money, unless paid.

Clark v. Mundal. Page 124

Payment.

31. Nor shall a bill so received, &c. go in discharge of a precedent debt, except made part of the contract. *Ib.*

Bill when discharges debt.

32. As where A. sells goods to B. and agrees to take a bill on C. in satisfaction, there A. is discharged, though it be never paid. *Ib.*

Vide *Ward v. Evans.* 442

33. (But now by stat. 3 & 4 *Ann.* if any person accept a bill of exchange, for, and in satisfaction of a debt, the same shall be esteemed a full and sufficient discharge, if the person accepting such bill for his debt, does not take his due course by endorsing, to get the same accepted and paid, and make his protest for non-payment, or non-acceptance.)

34. A bill payable to A. or bearer, is not assignable to charge the drawer ; contra, if to A. or order.

Hodges v. Steward. 125

Order, bearer.

35. But such indorsement charges the indorser, for the indorsement is in nature of a new bill. *Ib.*

36. *Trover* for a bank bill, payable to A. or bearer, will lie against the finder, who has notice, but not against the assignee who has acquired a property in the course of trade, as bearer or assignee.

Anonymous. 126

Finder of bill.

37. (A man is not entitled in general, to bring a bill in equity for satisfaction on a note lost, as he may in case of a bond, because at law he cannot declare on a bond, without a *profert* and *oyer* ; but if a note be lost, plaintiff may nevertheless recover at law.—*Per Lord Hardwicke.* *Vesey.* 38.)

Note lost.

38. The words, “ or to his order,” in a bill, gives authority to assign it by indorsement, &c.

Hill v. Lewis. 133

Order, effect of.

39. And the assigning of a bill, note, &c. not payable to order, charges the indorser, but not the drawer. *Ib.*

Not payable to order.

Salkeld.

40. Where there are two joint traders, and one accepts a bill drawn on both for him and his partner, it binds both, if it concerns the trade; otherwise if it concerns the acceptor only, in a distinct interest and respect.

Pinckney v. Hall. Page 126

Blank indorsement.

41. A blank indorsement on a bill, does not transfer the property, without some further act.

Clark v. Pigot. 126

Lucas v. Haynes. 130

Filled up.

42. But such indorsement may be filled up by the indorsee, so as to charge the indorser.

Lambert v. Pack. 127

Discount.

43. And so that the bill be purchased at discount, &c. and so may an acquittance, &c. *Ib.*

Demand.

44. In an action by the indorsee of a bill of exchange, against the indorser, it is not necessary to prove the drawer's hand, because though it be forged, indorser is liable, but the plaintiff must prove demand on the drawer, or him on whom it is drawn, and refusal; or that he sought him, and could not find him, and notice.

Lambert v. Pack. 128

(See *Heylyn v. Adamson.* 2 *Burr.* 678. Demand on the drawee, not on the drawer.)

Note.

45. Action lay not on a promissory note before the statute, and it can't be laid within the custom of merchants.

Clerk v. Martin. 129

Promise after day.

46. On a promise after day of payment, to pay *secundum tenorem billæ*, action lies.

Jackson v. Pigot. 127, 129

Acceptance after day

47. So acceptance after day of payment is good, and amounts to a promise to pay generally.

Mijord v. Wallicot. 129

48. An acceptance by letter is sufficient, as if his correspondent wrote to the drawer, that his bill shall be duly honoured. 1 *Atk.* 611.

49. On refusal of payment, the drawer may be charged as if the bill had been accepted absolutely, and then refused. 3 *Bac. Abr.* 261.

50. A de-

Salkeld.

50. A declaration may be against the drawer, without laying an express promise, for by the drawing it is implied. Against drawer.

Starkey v. Cheeseman. Page 128

51. In declaration on inland bills against the drawer, a protest need not be set forth, not necessary at common law.

Borough v. Perkins. 131

1 Lord *Raymond.*

52. Declaration on a bill of exchange, without setting forth the custom at large, but referring to it, sufficient. Custom.

Soper v. Dible. 175

53. Action lies against partners on a bill, drawn by one of them. By one partner.

Pinkney v. Hall. 175

54. The bearer of a note may maintain an action in the name of him to whom the note was made, payable against an indorser. Bearer, indorser.

Nicholson v. Sedgwick. 180

55. Custom of merchants necessary in declarations, on bills of exchange. Custom.

Bellasis v. Hester. 281

56. A bill payable ten days after sight, the day of sight is excluded. Day of sight.

Ib. 282

57. A bill is not indorsable in part, without satisfaction acknowledged of the rest, for such personal contract cannot be apportioned. Indorsable in part.

(*v. Holt.*)

Hawkins v. Cardy. 360, 744

58. A promise to pay a bill already due, *secundum tenorem*, &c. will amount to a general acceptance to pay the money. Promise to pay bill due.

Jackson v. Pigott. 364, 574

59. *Per Holt.*—There is a distinction where the day of payment is past, at the time of the acceptance, and where the day of payment is to come; in the former case, acceptance to pay *secundum tenorem*, &c. will amount to a general acceptance to pay the money; contra in the latter case.

1 Lord Raymond.

60 If plaintiff declares that the acceptance was before the day appointed for the payment, and that he accepted to pay it, *secundum tenorem et effectum billæ prædictæ*, and it appears in evidence, that the acceptance in fact was after the day of payment, this would be bad.

Jackson v. Pigott. Page 365
v. 574.

Sale without
indorsement.

61. *Per Holt.*—If a man has a bill payable to him or bearer, and he delivers it over for money received, without indorsement of it; this is a plain sale of the bill, and he who sells it, does not become a new security; but if he had indorsed it, he had become a new security, and then he had been liable upon the indorsement.

Bank of England v. Newman. 442

Blank indorse
ment.

62. A blank indorsement of a bill is sufficient, and the indorsee may over-write what he pleases.

Lambert v. Oakes. 443

Hand of
drawer.

63. In an action against an indorser, the drawer's hand need not be proved, for though it be forged, the indorser is liable. *ib.*

Express pro-
mise.

64. A declaration on a bill of exchange, is good, without an express promise.—Drawing a bill of exchange, is an actual promise.

Starke v. Cheeseman. 538

Negotiated
after due.

65. A bill may be declared on as negotiated, after it is due.

Musford v. Walcot. 575

66. The declaration stated, that the defendant promised to pay, *secundum tenorem et formam billæ*, &c.—*Per Holt.* As to the *secundum formam*, &c. it is the payment of the money, that is the substance of the promise, and such acceptance as will bind the acceptor, is sufficient.—Acceptance after the day of payment, is common, and there is no inconvenience in it. *ib.*

Against any
indorser.

67. The last indorsee of a bill, may maintain an action against any of the indorsers.

Mendez v. Carreroun. 743

Payment by
indorser action
against acceptor.

68. An indorser of a bill who has paid it, must prove the payment in an action against the acceptor. *ib.*

69. A

1 Lord *Raymond*.

69. A bill may be protested before the day, for better security, but not for non-payment.

Protested before day.

Anonymous. Page 743

70. A foreign bill must be protested on the last day of payment.

Foreign bill protested.

Taffel v. Lewis. 743

71. If the last of the three days be *Sunday*, or a great holiday, the day before is the day of payment.

Last of three days, holiday.

Ib.

72. There is no certain time for protesting inland bills.

Protest, inland bill.

Ib.

73. If the indorsee receives part from the acceptor, he cannot resort to the drawer.

Indorsee recovers part from acceptor.

Ib. 744

74. Defendant having torn his own note, signed by him, a copy sworn was admitted to be good evidence to prove it.

Copy of note, evidence.

Anonymous. 731

75. (Where an original note is lost, and a copy is tendered in evidence, sufficient probability must be shewn to the court, to satisfy them, as well of the loss, as that the original note was genuine, before plaintiff will be allowed to read it.—*Goodeir v. Lake.* 1 *Atk.* 44.)

76. (Where a bill is lost, and a new bill cannot be had from the drawer, a protest may be made on a copy, not if a new bill can be had from the drawer. *V. Stat.* 9 & 10 *Will.* 3. c. 17. & *Dehors & Harriott. Show.* 163.)

77. (If the party dies after acceptance, there must be a demand on the executors or administrators, and though the bill should be payable before they can be appointed, yet a protest should be made.

Molloy. 285)

2 Lord *Raymond*.

78. A servant sent to receive money on a bill, cannot accept a note instead of money, without his master's consent.

Servant, payment by note.

Ward v. Evans. 928

79. In this case it was determined, that a general *indebitatus assumpsit* might be maintained, to recover money for the value of a bill of exchange which was not paid.

(*v. Tatlock v. Harris.* 3 *D. & E.* 182.) *Ib*

2 Lord *Raymond*.

Servant, note
from banker.

80. A servant takes a note from a banker, instead of money, the master may maintain an action against the banker for money received to his use.

Ward v. Evans. Page 928

Demand next
morning.

81. A note is received about noon, the next morning is a reasonable time to go for the money. *Ib.*

Payment in
bad note.

82. A man who has received a bad note, may recover his money, though he does not bring the note back to the defendant;—for it is always conditional and understood not to be a discharge till paid. *Ib.*

Protest.

83. A protest is not necessary in an action upon an inland bill, except to intitle plaintiff to interest or damages.

Brough v. Parkings. 993

Particular
fund.

84. An appointment to pay money out of a particular fund, is not a bill of exchange, for the particular fund may fail, but a bill of exchange must be payable at all events.

Jenney v. Herle. 1361

In the alter-
native.

85. A promissory note to do an act, or pay a sum of money, is not negotiable.

Ib. 1362

86. (A note promising to pay fifty pounds, if A. B. doth not pay it within six weeks, is not negotiable, for the drawer was not the original debtor, but was made liable on a contingency. 8 *Mod.* 363. A note promising to account with A. B. or his order, for fifty pounds, value received, is within the stat. 8 *Mod.* 363, 364.)

To be ac-
countable.

87. A promissory note to be accountable to A. or order for one hundred pounds, is negotiable within the statute.

Morris v. Lee. 1396

Per Cur.—There are no precise words necessary to be used in a promissory note, or bill of exchange; a promise to be accountable, is a promise to pay. *Ib.*

Out of half-
pay.

88. "Pay to J. S. or order, nine pounds ten shillings, as my quarterly half-pay, by advance," a good bill of exchange, for it is not payable upon a contingency, or out of any particular fund, but at all events.

Mackled v. Snee. 1481

89. A

2 Lord Raymond.

89. A note to pay money, value received of the premises in *Rosemary-lane*, &c. held to be within the statute. Out of rents.

Burchell v. Slocock. Page 1545

90. A bill to pay out of the fifth payment when it shall become due, &c. no good bill of exchange. Uncertain fund.ⁿ

Haydock v. Lynch. 1563

91. The declaration need not aver that the note was signed by the defendant, it being alledged that he made a note in writing, by which he promised to pay. Signing.

Elliott v. Cooper. 1377, 1484

92. Need not be averred that the acceptance was in writing. Acceptance in writing.

Ereskine v. Murray. 1542

93. A bill need not be expressly averred to be drawn according to the custom of merchants. Custom of merchants.

Ib.

94. An action on a note by which the defendant and another promised jointly or severally, ill. Joint, or several promise.

Neale v. Ovington. 1544

Strange.

95. A bill payable out of a particular fund, is not a bill of exchange. Particular fund.

Jenny v. Herle. 591

96. "Pay out of my half-pay by advance" a good bill, for it is out of a certain fund.—*Jenny v. Herle* was only a private order to a man's servant. Half-pay.

Mackleed v. Snee. 762

97. A bill not payable to order, &c. and not said to be for value received, is not a bill of exchange, for it is not negotiable. To order value received.

Banbury v. Liffet. 1211

98. There may be a partial acceptance of a bill of exchange, for the party might have refused it, and *volenti non fit injuria*. Partial acceptance.

Wegerhoffe v. Keene. 214

99. It is sufficient if the note is drawn in the maker's handwriting thus, "I A. B. promise to pay" (or his name be Signing.

be

be written by him in any part of it,) &c. without being subscribed A. B.

Taylor v. Dobbins. Page 399

Strange.

What amounts to acceptance.

100. The bill is good, but wait till I write to my correspondent.—You may rest satisfied of the payment—amounts to an acceptance of a bill of exchange.

Wilkinson v. Lutwidge. 648

Interest from time of acceptance.

101. Interest given from the time of acceptance.

Ib. 649

Foreign law.

102. A man cannot be sued here on his acceptance of a bill of exchange abroad, after he has been discharged by the law of that country.

Burrows v. Jemino. 733

Indorsee indulges acceptor.

103. Indorsee indulges the acceptor for 20 days, the risque is his own.

Gee v. Brown. 792

Acceptance in writing.

104. Not necessary to aver the acceptance if a bill was in writing.

Ereskine v. Murray. 817

Per Cur.—If writing is necessary, it will be implied besides the writing required by the statute is only in order to make the drawer liable to damages and costs. *Ib.*

Forgery of bill.

105. The acceptor cannot set up forgery of the bill, for by acceptance he had given a credit to the indorsee.

Jenys v. Fawler. 946

106. Promissory note for the debt of another, is within the statute, though not being for value received, being an absolute promise, and every way as negotiable as if it had been generally for value received.

Foplewell v. Wilson. 264

Value received.

107. Value received, necessary in a bill of exchange.

Banbury v. Liffet. 1211

108. (It has been since settled on demurrer, that it is not necessary that the bill should import to be for value received.

Bailey on bills of exchange. 72.)

109. Action

Strange.

109. Action lies against a servant upon a bill drawn on him, and accepted generally, though the order is to place it to account of the master.

Action against servant.

Thomas v. Bishop. Page 955

110. A parol acceptance is sufficient in action against the acceptor.

Paid acceptance.

Lumley v. Palmer. 1000

111. (This was the opinion of lord chief justice *Eyre*, before the determination of this case, though Lord *Raym.* had held otherwise, wherefore lord *Hardwicke* made a case on an action brought by *Lumley* for the opinion of K. B. who agreed with lord *Eyre*. 1 *Atk.* 611, 613.

112. The acceptance must be in writing to charge the drawer with damages and costs by stat. 3 & 4 *Ann. c. 9*
Ib. 1000

113. Acceptance of a bill of exchange, to pay when the goods are sold, good.

Conditional acceptance.

Smith v. Abbot. 1152

Per Cur.—Pl. might have refused this acceptance, but it cannot be said he might not submit to it. *Ib.*

114. Acceptance to pay as remitted, no absolute acceptance.

Banbury v. Lisset. 1212

115. In action against the acceptor of a bill, the hand of the drawer need not be proved.

Hand of drawer.

Wilkinson v. Lutwidge. 648

116. *Per Cur.*—The proof of an acceptance is a sufficient acknowledgment on the part of the acceptor, who must be supposed to know the hand of his correspondent; but it is not conclusive evidence, if the defendant can shew the contrary. *Ib.*

117. Indorser of a bill of exchange may be charged, without first resorting to the drawer.

Indorser chargeable without.

Bromley v. Frazier. 441, 515

118. To require a demand on the drawer, would prevent negotiability, the drawer may live abroad, and the indorser does not warrant in default of the drawer, for every indorser is in nature of a new drawer. *Ib.*

Indorser, drawer.

119. But

- Strange.*
- Demand,
drawer of note.** 119. But in case of notes, there must be a demand on the drawer, before the indorser can be charged.
v Siderbottom v. Smith. Page 649
& Collins v. Butler. 1087
- Execution
against drawer
and indorser of
note.** 120. It is a contempt to take out execution both against the drawer and indorser of a promissory note.
Windham v. Wither. 515
- The plaintiff had brought two actions on a promissory note, one against the drawer, and another against the indorser, and recovered in both. *Ib.*
- Feme covert,
indorsement.** 121. *Feme covert* cannot indorse a bill of exchange, the right being in law vested in the husband.
Connor v. Martin. 516
- The plaintiff declared upon a promissory note made to a *feme covert*, and indorsed by her to him. *Ib.*
122. The order of an indorsee may sue on a general indorsement to him only, that being the legal import of the indorsement.
Acheson v. Fountain. 557
- Tender on
3d day.** 123. Holder of a bill must tender it, before three days of grace expire.
Coleman v. Sayer. 829
- No interest
without protest.** 124. Interest on a bill not to be allowed without a protest.
Harris v. Benson. 910
- Acknowledg-
ment of in-
dorser, forgery.** 125. Where a man has owned his hand to an indorsement, he shall not set up a defence of forgery by similitude;—for it would tend to destroy all negotiation of notes and bills, but the court seemed inclined to allow proof of actual forgery.
Cooper v. Le Blanc. 1051
126. (Vide *Sayer* 223 & 1 *Dur.* & *E.* 654. evidence of forgery refused in action against acceptor, 1 *Strange* 946.)
- Day mate-
rial.** 127. The day is material in setting forth a note.
Cole v. Hawkins. 12

Strange.

128. Note to pay two months after the ship is paid off, is negotiable, for the paying of the ship is a thing of a public nature.

Certainty.

Andrews v. Franklin. Page 24

129. Note to be accountable for money, is within the statute.

To be accountable.

Morris v. Lee. 629

130. Note payable so many days after marriage, not a negotiable note.

Payable after marriage.

Beardesley v. Baldwin. 1151

131. A note payable so many days after the death of the drawer's father, is good, for there is no contingency whereby it may never become payable.

Contingency.

Cooke v. Colehan. 1217

132. Note to deliver horses, &c. and pay money, not within the statute.

To deliver horses, &c.

Martin v. Chauntry. 1271

133. Action by indorsee of bill of exchange against drawer, the indorsee gave the acceptor time from the 14th May, till 7th June, when the acceptor failed, and there being no notice to the drawer, the indorsee must bear the loss.

Notice to drawer.

Gee v. Brown. 792
(*V. Blefard & Hirst*, 5 Burr. 2670. Notice to indorser.)

134. Usury pleaded to an action against the defendant as an indorser of a note, verdict for defendant.

Massa v. Dauling. 1243

135. The indorser of a note cannot lay a charge on the giver of the note in a manner different from the terms of it, but he may charge himself with terms different from the tenor of the note, for he is a new drawer; if the note be payable 1st May, and the indorsement appoints it to be 1st April, as to the indorser, this is a promissory note payable the 1st of April.

Indorsement, different terms.

Smallwood v. Vernon. 478

136. A man cannot be sued here on his acceptance of a bill of exchange abroad, after he has been discharged by the laws of that country.

Burrows v. Femino. 733

137. Third

Strange.

137. Third indorsee of a note kept it from the 1st November, to the 7th January, without receiving it of the maker of the note, in an action against first indorsee without notice, plaintiff was non-suited for his neglect.

Pepys v. Lambert. Page 707

What imports.

138. *Fecit notam, per quam promisit solvere*, imports a signing.

Elliot v. Cowper. 609

Demand, endeavour to find.

139. Indorsee proved that the maker of the note which was due 27th December, had in the November before shut up house and gone away, this was held not of itself sufficient to make a demand unnecessary, but that the indorsee should have made further enquiries, and attempted to have found him out.

Collins v. Butler. 1087

(*V. Dougl.* 497. *Strange* 1246, & 1 *Wils.* 46.)

Consideration of.

140. Consideration of a promissory note enquired into, in action by payee, against the maker.

Jefferies v. Austin. 674

Part received from drawer.

141. Where part of a note is received of the drawer, the indorser is not to be resorted to for the rest, for the indorsee thereby takes upon himself to give the whole credit to the drawer.

Kellock v. Robinson. 745.

Joint or several demand.

142. Defendant and another promised to pay jointly or severally, plaintiff should declare generally against one that he promised to pay, without mentioning the other, or against both, that he and another jointly or severally promised, &c.

Butler v. Malissy. 76, 819

(*V. Rees v. Abbot, Cooper*, 832.)

Indorsement struck out at trial.

143. Indorsement of note struck out at *nisi prius*, it being only a blank indorsement.

Theed v. Lovel. 1103

Proof, writ of inquiry.

144. After judgment by default, a promissory note set out in the declaration, need not be proved, but it must be produced to see whether there is any indorsement of payment on it.

Bevis v. Lindfell. 1149

145. The

Strange.

145. The innocent indorsee of a gaming note, can maintain no action against the drawer, for such notes are void by stat. 9 Ann. c. 4. s. 1. Gaming note.

Bowyer v. Bampton. Page 1155

146. Note indorsed to a debtor of a bankrupt, after the bankruptcy, cannot be set off, for the words of the act are mutual debts before. Debtor of bankrupt.

Marsb v. Chambers. 1234

147. If indorser pays part of a note, this dispenses with proving a demand on the maker of the note. Indorsee pays part

Vaughan v. Fuller. 1246

148. A banker's note was paid to plaintiff after dinner, who sent it the next morning at nine, when the banker had stopt payment, there was no laches on the plaintiff, so as to fix the loss on him; in all these cases there must be a reasonable time allowed, consistent with the nature of circulating paper credit.

Fletcher v. Sandys. 1248

(See *Str.* 415, 416, 910, 550.)

149. Notes may be indorsed by an administrator.

Robinson v. Stone. 1260 Indorsement by administrators.

Hardwicke.

150. A bill of exchange is a contract, depending on the custom of merchants; the drawer contracts that he will pay, if the drawee does not; and so does the acceptor, and so do the indorsers;—a general acceptance is a contract to pay *secundem tenorem bille*. *Per Yorke, Ch. J.* Nature of.

Thomas v. Bishop. 1

151. Bill drawn on H. B. cashier of *York* building company, to be placed to the account of the *York* building company, accepted generally, and held H. B. bound in his private capacity, and that no evidence should be admitted against plaintiff to shew this, was to be a charge on the company's fund. Accepted for a company.

Ib. 3

152. A parol acceptance is sufficient to charge the acceptor for the principal sum, but by the statute it must be in writing to entitle the drawee to charge the drawer with interest and costs. Acceptance in writing, to charge interest.

Lumley v. Palmer, 69. See also *Clavey and Dobbin*. 264

153. A

Hardwicke.

Note, order.

153. A promissory note payable to plaintiff, without laying order, is within the statute.

Moore v. Paine.

Page 274

1 *Wilson.*

154. Request to pay before due, error brought immaterial; for it is not necessary to lay any request, the bringing of the action is a request in law;—the words often afterwards sufficient.

Frampton v. Coulson.

33. v. 1

155. If the drawer of a note be sued by the indorsee, and the bail for the drawer pays the debt and costs, this absolutely discharges the indorser, as much as if the drawer himself had paid off the note;—the payment by the bail for the drawer, is the same as payment by the drawer.

Hill v. Pitfield.

46. v. 1

Per Cur.—The acceptance, (i. e. the taking of the note) is intended to be upon this agreement, that the indorsee will receive it of the first drawer if he can, and if he cannot, then that the indorser will answer it.—The indorser of a note, is only a warrantor thereof, that the drawer will pay it, and if he does not, that the indorser will. *Ib.*

If the indorsee receives part of the money on a note from the drawer, the indorser is discharged. *Ib.*

By drawer,
against acceptor.

156. An action upon a bill of exchange, lies for the drawer against the drawee, after he has accepted it.

Simmonds v. Parminter.

185. Vol. 1

157. The acceptor makes himself liable to the drawer, as well as to the payee, and to every indorsee to whom the payee shall transfer the bill. *Ib.*

158. (This case went to the lords upon a writ of error, who affirmed the judgment of *K. B.* 4th *Brown.* Cases in *P.* 604.)

159. The acceptance is evidence, that the drawee had goods of the drawer in his hands. *Ib.*

Negotiable
note.

160. What shall be deemed a negotiable note within the statute. 3d & 4th *Ann. chap. 9.*

Evans v. Underwood.

262. V. 1.

1 *Wilson.*

161. A note drawn by A. payable to B. or order, for value received, B. pays it to C. afterwards B. takes it up, and pays C. the value; afterwards B. pays it to C. a second time, then B. fails, and C. brings an action against the drawer, and the jury find for the defendant, because the note was once taken up and paid, but the court granted a new trial.

Note once taken up, and paid.

Gomez Serra v. Berkley. Page 46. Vol. 1

162. For the note was for value received, and there was no evidence that the plaintiff knew of any transaction between the defendant, (the maker), and the indorsers. *Ib.*

2 *Wilson.*

163. A creditor accepts a note or draft of his debtor upon a third person, to be paid a sum of money for value received, if he holds it an unreasonable time before he demands the money, and the person upon whom it is drawn, becomes insolvent, it is the creditor's loss, though this draft be neither a bill of exchange, nor negotiable.

Holder retains a bill not negotiable.

Chamberlyn v. Delarive. 353. V. 2

Per Cur.—The party by taking the note, undertook to be duly diligent in trying to get the money from the person on whom it was drawn;—the defendant has been deluded into a belief, that the plaintiff got the money of that person; the common law detests negligence and laches.—The plaintiff by holding this order four months, hath discharged the drawer the defendant of his debt, and credited the person on whom it was drawn in his place. *Ib.*

164. In an action by the indorsee of a bill of exchange against the drawer, although the indorser has paid part of the money to the indorsee, yet he may recover the whole sum in the bill against the drawer.

Part paid indorsee, recovers the whole against drawer.

Johnson v. Kennion. 262. 2 Vol.

165. The indorser has his remedy against the indorsee for the residue, but if the action was brought by the indorsee for the residue only, the indorser who paid him would have his action against the drawer for the part he had paid, and so multiply actions. *Ib.*

(1 *Salk.* 65, & vide *Hen. Bl.* 38.)

166. *Per Chief J.*—The bill is but one security for one sum of money—though the indorser has paid part, he does not pay it as servant or agent for the drawer, the indorsee may

may recover the whole sum, and then he will be liable for so much as the indorser has paid.—*Gould. J.* where the drawer has paid part of the bill, you may indorse it over for the residue, otherwise not because it would subject him to a variety of actions.

Johnson v. Kennion. Page 262. 2 Vol

Where there are many indorsers, the indorsee has a right of action in succession, but there is but one right of action under the bill against one person, at one and the same time. *Id.*

3 *Wilson.*

Indorsed by
administrator.

167. A promissory note payable to A. B. or his order may be indorsed and assigned over by his administratrix, and the indorsee being plaintiff, need not make a *proferit in curiam*, of the letters of administration.

Rawlinson v. Stone. 1

Negotiable.

168. A writing in these words, viz. “*January 8, 1786.*
“*Seven weeks after date, please to pay Miss Read, thirty*
“*pounds and seventeen shillings, out of W. Steward’s money,*
“*as soon as you receive it for your humble servant.*
£30. 17s. *De Lorane.”*

Future uncertain
fund.

“*To Timothy Brecknock, Esq. St. Mary le Bone.*” Accepted by *Timothy Brecknock*, is not a bill of exchange within the custom and usage of merchants, for it is payable out of a future uncertain fund, which might or might not happen.

Dawkes v. De Lorane. 207

169. A bill of exchange must carry with it a personal and certain credit, given to the drawer not confined to credit upon any thing or fund, it is upon the credit of a person’s hand, as on the hand of the *drawer*, the indorser or the person who negotiates it; he to whom such bill is made payable or endorsed, takes it upon no particular event or contingency, except the failure of the general personal credit of the persons drawing or negotiating the same. *Id.*

To *feme* who
marries.

170. A promissory note being payable to a *feme sole*, or her order, she marries, it becomes her husband’s property, and she cannot indorse it over while she is covert.

Rawlinson v. Stone. 5

171. The

Bills and Notes.

1 *Blackstone.*

171. The law has prescribed no time when bills must be received—in this case the holder got the bill marked for acceptance the same night. Time for receiving.

Hankey v. Trotman. M. 20 Geo. 2. Page 1

172. Plaintiff was a banker, a bill was delivered to him at twelve o'clock at noon on another banker, who stopped payment before the next morning, verdict for defendant.

Ib.

173. A bill payable to A. or order, and indorsed personally to B. without the words "or order," is not a restrictive indorsement, but the bill may be afterwards indorsed by B. to another man. *Edie and Laird v. The East India Company. T. 1 Geo. 3.* Special indorsement.

295

174. Where an indorsement is in blank, you may over-write what you please. Blank indorsement.

Ib., 297

175. Drawee of a forged bill who accepts and pays, or pays it only, cannot recover back against the payee; one innocent man must not relieve himself by throwing it on another. Drawee of forged bill pays.

Price and Neale. M. 3 Geo. 3. 390

In this case also, the negligence in the plaintiff is greater than can possibly be imputed to the defendant. *Ib.*

176. Defendant may set up an illegal consideration, to avoid a note of hand in an action by payee against maker, for though a bond or note is, *prima facie*, evidence of a good consideration, it does not preclude the plaintiff from shewing that the consideration in fact is a bad one. Illegal consideration.

Guisberd v. Roberts. 445

177. (It seems a reasonable distinction which has been taken between an action between the parties themselves, in which case evidence may be given to impeach the promise, and an action by or against a third person who is an indorser or acceptor.)

(Vide 2 *D. & E.* 72.) *Buller N. P. 274.*

178. A note given fraudulently to carry on a marriage treaty, shall be good against the drawer, though given without any consideration.

Montefiori v. Montefiori. 363

1 *Blackstone.*

Plaintiff being engaged in a marriage treaty, defendant his brother to assist him in it, and to represent him as a man of fortune, gave him a note for a large sum of money, as for a ballance of accounts which did not exist, plaintiff recovered.

Montefiori v. Montefiori. Page 363

Per Lord Mansfield.—The law is, that where upon proposals of marriage, third persons represent any thing material in a light different from the truth, even tho' it be by collusion with the husband, they shall be bound to make good the thing in the manner they have represented it; it shall be as represented to be. *Ib.*

Payable to
bearer.

179. Bills payable to bearer, are negotiable like other bills of exchange, and the holder may maintain his action against the drawer; the bill in this case was payable to *Ship Fortune*, or bearer.

Grant v. Vaughan. T. 4 Geo. 3. 485

180. Bills payable to A. B. or bearer are clearly intended to be transferred in the most easy manner without indorsement—but the bearer must shew he came to it, *bona fide*, upon valuable consideration. *Ib.*

181. *Per Wilmot, J.*—The word bearer is only a description of the person with whom you contract, the contract is to pay the bill either to you or to the person to whom you shall deliver it, or to whom he shall deliver it *in infinitum*.—Bills of exchange are only promissory notes to pay such a sum, in case the drawee does not.—*Per Lord Mansfield*, it was held even in 2 *Freeman*, 258. that a bill payable to A. or bearer was like so much money paid; whatever transactions may be between A. and the drawer of the bill, the bearer shall have his whole money. *Ib.*

2 *Blackstone.*

Against
drawer, notice.

182. Action cannot be brought against the drawer of a bill of exchange till notice of refusal, insolvency or absconding of the drawee.

Dagglish & Weatherby. H. 11 Geo. 3. 747
(*v. Dougl.* 654.)

Uncertain
fund.

183. Bill of exchange not good, so as to be declared upon as such when drawn, payable out of a special future and uncertain fund.—*Dawkes and Wife, v. Earl of Deloraine.* T. 11 Geo. 3. 782

Per

2 *Blackstone.*

Per Cur.—A bill of exchange always implies a personal general credit not applicable to particular circumstances or events which cannot be known to the holder of the bill, in a general course of negotiation.

Dawkes and Wife, v. Earl of Deloraine. T. 11 Geo. 3.
Page 782

184. Bill drawn on a factor, and payable out of the produce of goods in his hands after discharging prior acceptances, and accepted by him generally, is chargeable on him notwithstanding any balance then due to him in a running account with his principal. On factor, balance.

Maber v. Masias. P. 16 Geo. 3. 1072

185. The holder of a bill of exchange may sue a subsequent indorser, though he has (ineffectually) taken in execution, and afterwards set at liberty the body of the prior indorser. Subsequent indorser, prior taken in execution.

Hayling v. Mulball. M. 19 Geo. 3. 1235

186. *Per Curiam*, the bill holder has a right to sue all the indorsers till the bill is satisfied, each indorser is independent of the rest, the taking of the body of one by *ca. fa.* is with respect to him a full satisfaction of the debt, but it only operates as a discharge of the identical person. *Ib.*

1 *Burrow.*

187. If made payable certainly and at all events, it is a good note, within 3, 4. *Ann. c. 9. §. 1.* otherwise if it be contingent and uncertain whether it shall ever be paid at all or not. Contingent.

Goss v. Nelson. 227, 228

188. A promissory note given to an infant, payable when he shall come of age, and specifying the particular day, (*viz. 12th June, 1750.*) is of the former kind. *Ib.*

189. For this is certainly and in all events payable. *Ib.*

190. The distance of time makes no difference. *Ib.*

191. Nor the adding that 'tis the day of the infant's coming of age. *Ib.*

192. It is *debitum in presenti*, though *solvendum in futuro*. Debitum in presenti.

Ib. 228

M 2

193. Note

1. *Buttress.*

Uncertain.

193. Note in the name of two, but signed by one only, promising to pay on the death of G. H. "provided he leaves either of us sufficient to pay the said sum, or if we shall be otherwise able to pay it."

Roberts v. Peake. Page 325, 326

194. This is not a negotiable note within 3, 4. *Ann.* 9. s. 1. being only eventual, not absolute.

Ib.

195. If it had, the declaration might have been against that one singly who signed it.

Ib. 325

196. But this declaration was upon an absolute note which was not supported by producing this conditional note in evidence, but was a variance.

Ib. 325, 326

197. A bank note payable to *William Finny* or bearer on demand, was sent into the country by the general post, the mail was robbed, and this note taken out;—this note (for £21. 10s. only,) being so stolen, was paid to an inn-keeper for a full and valuable consideration, and in the usual course and way of his business, and without any notice or knowledge of this robbery, or of its being taken out of the mail, payment was stopped at the bank, the note was brought thither for payment, the cashier refused to pay it, or to re-deliver it, *trover* was brought by the inn-keeper who had judgment against the cashier.

Miller v. Race. 455 to 460

Promissory
note when in-
dorsed, resem-
bles bill.

2. *Buttress.*

198. An original undorsed promissory note has no resemblance to a bill of exchange, but when once indorsed, it has an exact analogy to a bill of exchange, the indorser then resembles the drawer of a bill, the maker, the acceptor of a bill, and the indorsee, the payee of a bill, and promissory notes, and inland bills of exchange, are just upon the same footing.

Heylyn v. Adamson. 676, 677

199. A confusion has arisen from calling the maker of a note "the drawer," and not considering who is the original debtor.

Ib. and 678

Demand of
maker.

200. The indorsee is bound to apply to the maker of the note, and if he is guilty of a neglect, and the maker becomes insolvent, the indorsee loses the money, and cannot come upon the indorser at all.—§ 6, and if the indorsee of a note

a note brings an action against the indorser, he, (the plaintiff) must prove a demand of, or due diligence used to have gotten the money from the maker of the note.

Heylyn v. Adamson. Page 676, 677, 678.

2 Barrow.

201. Per Lord Mansfield.—A bill of exchange is an order or command to the drawee who has or is supposed to have effects of the drawer in his hands, to pay when the drawee has accepted; he is the original debtor, and due diligence having been used, and therefore if the acceptor is not called upon within a reasonable time after the bill is payable and happens to break, the drawer is not liable at all, every man therefore who takes a bill of exchange, undertakes to demand the money of the drawee; the bill when indorsed becomes a new bill; the indorser stands in place of the drawer, and the indorsee undertakes to demand the money of the drawee, if the drawee refuses payment, his immediate remedy is against the indorser.—The indorsee does not trust to the credit of the original drawer, the indorser is his drawer, and the person in whom he originally trusted in case the drawee should not pay the money.—We are all of opinion that in actions upon inland bills of exchange, by an indorsee against an indorser, the plaintiff must prove a demand of or due diligence to get the money from the drawer (or acceptor,) but need not prove any demand of the drawer, and that in actions upon promissory notes by an indorsee against the indorser, the plaintiff must prove a demand of, or due diligence to get the money from the maker of the note.—*ibid.*—and see observations on the case of *Lambert and Pack. Salk. 127.* which confounds the maker of a promissory note, and the drawer of a bill of exchange.

No demand on drawee, but on drawer.

202. In actions upon foreign bills of exchange, this point was formerly settled, "that a demand upon the drawer is not necessary in order to charge the indorser;" and there is no difference between foreign and inland bills in this respect, except as to the degree of inconvenience.

Demand on drawer, not necessary.

Ibid. 678

203. As to inland bills, chief justices at *nisi prius*, have been of different opinions about the necessity of such proof.

Id.

Ib. 672, 673, 674

204. Yet *Mab's* opinion seems to have been misapprehended and misreported, and may be reconcileable with the present solemn resolution.

Id.

Ib. 677, 678

205. An

2 Burrow.

Indorsement,
new bill.

205. An indorsed bill becomes by such indorsement a new bill, as between the indorser and indorsee, and the indorser stands in the place of the drawer, *Ib.* and if the indorser neglects to demand the money of the drawee, and the drawee becomes insolvent, the loss falls upon the indorsee, *Ib.* if he is diligent and the drawee refuses payment, his immediate remedy is against the indorser, though he may have another remedy against the first drawer as assignee to the indorser.

Heylyn v. Adamson. Page 675.

Hand of first
indorser.

206. In an action brought by him against the indorser, he is never put to prove the hand of the first drawer. 675

Demand.

207. In an action on a bill of exchange by indorsee against indorser, he needs not set forth any demand from the original drawer, or even any endeavour to find him out.

Ib. 677, 678

208. If the original bill be made payable to the payee or order, it becomes thereby negotiable and assignable, and being so in its nature negotiable and assignable may be indorsed over, (*toties quoties*,) without adding the words, "or order," to the indorsement, which follows the nature of the original bill.

Edie v. East India Company. 1216 to 1229

209. This has been fully settled by judicial legal determinations. *Ib.*

210. Therefore evidence shall not afterwards be admitted of a contrary usage amongst merchants. *Ib.*

Custom of
merchants.

211. For the custom of merchants is the *lex mercatoria*, and is part of the general law of the land. *Ib.*

212. And these judicial legal determinations have already settled what is the custom of merchants, and consequently what is the *lex mercatoria*, and consequently what is the law of the land, as to the point in question, after which it ought not to be left to the opinion of a jury. *Ib.*

Lex merca-
toria, when
doubtful.

213. Where the law concerning the custom of merchants stands doubtful, there may be evidence given to prove such custom, but it must be proved by facts, not by opinion only, and must be subject to the controul of law.

Ib. 1228

214. A

2 *Burrow.*

214. A blank indorsement may be filled up even at the trial. Blank indorsement filled up at trial.

Edie v. East India Company. Page 1225 and 1218

215. Transferring a bill by indorsement, differs greatly from giving a naked authority to receive it. Indorsement.

Ib. 1226, 1227

216. 'Tis not clear that the former can be restrained and limited, so as to preclude the assignee from assigning it over, because he has purchased it, and its negotiability for a valuable consideration. Id.

Ib.

217. But the latter may be done by express restrictive words, and a declared intention appearing upon the face of the indorsement, for in this latter case no consideration at all is paid for it. Id.

Ib.

218. Promissory notes and bills of exchange, both foreign and inland, are just the same in these respects, and the determinations upon them, are governed by the same rules. Id. Foreign and inland.

Ib. 1224, 1227

3 *Burrow.*

219. A bill forged but not discovered to be so, was accepted and paid by the drawee to the indorsee who had paid a full and valuable consideration for it, and acted innocently, and *bona fide*, without the least privity or suspicion of the forgery; the drawee cannot recover the money back from the indorsee, in an action for money had and received to his use, for even supposing no negligence in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man. Forged, innocent holder.

Price v. Neale, 1354 to 1357

220. A merchant gave a cash note upon his banker to *Bicknell*, worded thus—"pay to ship *Fortune*, or bearer, such a sum," *Bicknell* lost it, *Grant* received it in payment in the course of trade fairly, *bona fide*, and for a valuable consideration; payment being refused, *Grant* brought his action against the drawer (the merchant,) and inserted two counts, one upon an inland bill of exchange, the other an *indebitatus assumpsit*, for money had and received to his use.

Grant v. Vaughan. 1516 to 1530

221. This bill or note is negotiable without indorsement. 1523 to 1530

222. "Whether

3 *Burrow.*

Question of.

222. "Whether a bill or note be negotiable or not," is a question of law and not of fact to be left to a jury.

Grant v. Vaughan. Page 1516 to 1530

Loh.

223. This loss ought to fall upon *Bicknell* who lost the note, not upon *Grant* who came fairly by it. *Ib.*

Fair holder.

224. The bearer (proving that he came fairly by such bill or note,) may maintain his action against the drawer in the bearer's own name as bearer. *Ib.*

Specialty.

225. And it seems that he may declare upon it, as upon a specialty, (contrary to the opinion of Lord *Cb. J. Holt.*) *Ib.* 1525 to 1529

Bearer.

226. But undoubtedly, an *indebitatus assumpsit* for money had and received to the plaintiff's use, may be brought by the *bona fide* bearer of a bill or note made payable to bearer. *Ib.*

Venue.

227. There is no sort of foundation for a distinction "that such a note or bill is negotiable in *London* only, and not any where else." *Ib.* 1529, 1530

228. (Vide 1 *Burr.* 452. and *Dougl.* 613.)

Acceptance, consideration.

229. *White* a merchant in *Ireland*, drew upon the plaintiffs *Pillans* and *Rose* merchants in *Holland*, for 800*l.* payable to *Clifford*, they paid the money to *Clifford*, and then wrote to the defendants, (*Van Microp* and *Hopkins*,) merchants in *London*, to know "whether they would accept such bills as they should in about a month's time draw upon them for 800*l.* upon the credit of *White*;" the defendants wrote back, "that they would honor their bill drawn on account of *White*," the plaintiffs accordingly drew upon the defendants, but in the interim *White* failed; the defendants gave notice of this to the plaintiffs, and forbid the plaintiffs to draw upon them, and the defendants refused their bills; the plaintiffs brought their action against the defendants, the jury found for the defendants, the court set aside their verdict.

Pillans & Rose v. Van Microp & Hopkins. 1663 to 1675

Nudum pactum.

230. This is not *nudum pactum*, and a void undertaking upon the foot of the consideration being part. *Ib.*

3 *Barrow.*

231. If the undertaking had been upon a part consideration, or even no consideration, yet in this commercial case it would bind. Consideration.

Pillans & Rose v. Van Mierop & Hopkins.

Page 1663 to 1675

232. The idea of a *nudum pactum*, explained. *Ib.*

233. In commercial cases among merchants, the want of consideration is no objection. Commercial cases, want of consideration.

Ib. 1669

234. Nor will that objection hold in other cases, perhaps where the undertaking is in writing. Undertaking in writing.

Ib. 1669 to 1671

235. The law of merchants is the law of the land, and the court are to judge of it, not the jury. Law of merchants.

Ib. 1669 to 1674

236. The acceptance of a bill needs not to be upon the bill, it may be collateral. Acceptance collateral.

Ib. 1674

237. It will bind, though no effects of the drawer are in the hands of the acceptor. No effects in hands of drawer.

Ib.

238. This agreement "to accept," is a virtual acceptance. Agreement to accept.

Ib.

5 *Barrow.*

239. The indorsee of an inland bill of exchange, tendered the bill for acceptance, the person upon whom it was drawn refused to accept it; the indorsee kept the bill three weeks without giving notice of such refusal, the drawer remained solvent during these three weeks, and then failed before the bill became payable; the loss falls upon the indorsee who neglected to give notice of the refusal to accept it, to the indorser. Refusal to accept, notice to indorser.

Blesard v. Hirsh and another. 2670

Str. 792. 2 *Wils.* 353. & 1 *D. & E.* 495, 167, 712.

1 *Stra.* 829. *Salk.* 127. 1 *Str.* 707.

Comper.

240. An indorsee of a promissory note payable three months after date, may be discharged under an insolvent act, which takes place before the three months are expired, for it is *debitum in presenti, solvendum in futuro*.

Workman v. Leake. 23

241. If

Cowper.

Security to
indorsee, depo-
sited with
drawee.

241. If the indorsee of a bill of exchange, who has received a navy bill assigned to the drawee as a security to him (the indorser,) till the bill of exchange is accepted, deposite such navy bill with the drawee, and the drawee receive the money upon it, he (the drawee) is answerable for the amount in an action for money had and received, though he may have done nothing that amounts to an acceptance of the bill of exchange.

Pierfon v. Dunlop. Page 571

242. The indorsee has a lien notwithstanding the assignment on such certificate in the hands of the drawee. *Ib.*

Implied, un-
dertaking to
accept.

243. If the drawee of a bill of exchange says, "he cannot accept it till stores are paid for," it is an undertaking to accept when the stores are paid for. *Ib.*

Engagement
to drawer, not
acceptance.

244. It is a rule among merchants that a mere engagement to the drawer of a bill, saying he will duly honor it, is no engagement to the holder of it, and therefore not of itself an acceptance. *Ibid.* 572, 3

If it may
induce third
person.

245. But if such engagement be accompanied with such circumstances as may induce a third person to take the bill by endorsement, it may amount to an acceptance.

Ibid. 574

Discharge of
acceptor.

246. The actual arrest of the drawer is no discharge of the acceptor. *Ib.*

Conditional.

247. There may be a conditional as well as an absolute acceptance. *Ibid.*

Joint on
several.

248. Declaration against the defendant, only stating that he and another made their promissory note, by which they jointly or severally promised to pay, is good.

Rees v. Abbott, on a writ of error. 832

Lord Mansfield.—"Or" in this case is synonymous to "and"—they both promise that they or one of them shall pay; then both and each is liable *in solidum*.

Per Buller, J.—If the note had been a joint note only, not a joint and separate note, the defendant could only have pleaded in abatement, it would not have been error. *Ib.*

249. If

Douglafs.

249. If a bill of exchange is not accepted, an action will immediately lie against the drawer before the time when it is made payable.

Action
against drawer
before payable.

Milford v. Mayor. Page 55

250. *Per Buller.*—J. The reason is this, that what the drawer had undertaken, has not been performed, the drawee not having given him the credit which was the ground of the contract. *Ib.*

251. Nothing but an express declaration by the holder will discharge the acceptor, the acceptor is first liable, and it is not necessary to shew notice to him of non-payment by any other person.

Acceptor,
what discharge.

Dingwall v. Dunster. 235 to 238

Per Cur. The conduct of the plaintiff amounts only to indulgence towards the acceptor, and meant nothing more than this, that he would try to recover from the drawer, who in this case was the original and true debtor if he could. *Ib.*

252. Plaintiff was an indorsee, and had arrested defendant the acceptor, but finding no consideration had been given for the acceptance, his attorney took a security from the drawer, and then wrote to the acceptor that he had settled with the drawer, and he need not trouble himself any further; this was held to discharge the acceptor, tho' the drawer became a bankrupt.

Black v. Peele. 236

253. A bill of exchange given for money won at play, is void even in the hands of an indorsee for valuable consideration without notice.

Gaming.

Peacock v. Rhodes. 614, 713 to 716, & 235, note.
(*V. Strange* 1155.)

254. An agreement to accept may amount to an acceptance.

Agreement
to accept.

Mason v. Hunt. 285, 286

255. Such agreement may be so expressed as to put an indorsee in a better situation than the drawer, for a third person who should advance his money upon it, would have nothing to do with the equitable circumstances which might subsist between the drawer and the acceptor.

Ibid.

Ib. 286

256. An

Douglafs.

Conditional.

256. An agreement to accept on certain conditions, is discharged if the conditions are not complied with.

Mufon v. Hunt. Page 284, 287

What dis-
charges accep-
tor.

257. If there is a virtual acceptance in consideration that goods shall be consigned to the acceptor, to answer the bill together with a policy on them, the holder of the bill, by taking the goods and selling them himself, discharges the acceptor.

Id. 284, 287

Attorney sued
as acceptor.

258. An attorney sued by original on a bill of exchange, and declared against as having accepted it according to the usage and custom of merchants, may plead his privilege in abatement.

Gomerford v. Price. 299, 300

Per Butler J.—There is no inconvenience here, for every one who takes a bill of exchange, ought to make it his business to inquire into the situation and circumstances of those whose names are upon it.

Id.

Usurious con-
tract.

259. A bill of exchange given upon an usurious contract, is void in the hands of an indorsee, though for valuable consideration, and without notice of the usury.

Lowe v. Waller. 713 to 716

Per Lord Mansfield. This is one of the cases where private must give way to public convenience.

Id.

Blank in
document.

260. An indorsement written on a blank note or check in the form of a bill of exchange or promissory note, will bind the indorser for any sum and time of payment which the person to whom he entrusts the note so indorsed shall insert in it; it is a letter of credit for an indefinite sum.

Russel v. Langstaffe. 496 to 498

261. And the holder may declare against such an indorser as indorser of a bill of exchange, or promissory note.

Id.

Notice, non-
payment.

262. What shall be reasonable notice to the indorser of non-payment by the acceptor of a bill of exchange, or drawer of a promissory note, is for the decision of the jury.

Id. 497

263. A

Douglas.

263. A bill of exchange with a blank indorsement, being stolen and negotiated, an innocent indorsee for valuable consideration, shall recover upon it against the drawer. Note stolen, innocent indorsee.

Peacock v. Rhodes. Page 611 to 614

264. *Per Lord Mansfield.*—The holder of a bill of exchange or promissory note is not to be considered in the light of an assignee of the payee, an assignee must take the thing assigned, subject to all the equity to which the original party was subject, and if this rule applied to bills and promissory notes, it would stop their currency.—The holder of a bill or note coming fairly by it, has nothing to do with the transaction between the original parties, unless in the case of a note for money won at play. *Ib.*

265. So the innocent holder of a forged bill of exchange for which he has given valuable consideration, shall recover against the acceptor who accepted it, not knowing of the forgery. Innocent holder, forged note.

Ib. 613

266. There is no difference between a note indorsed blank, and a note payable to bearer, they both go by delivery, and possession proves property in both cases. *Ib.*

(*V. 3 Burr. 1516.—1 Burr. 452.—1 BL 485.*)

267. A bill of exchange being drawn by A. on B. payable to C, or order, and indorsed by C. in these words, "the within must be credited to D. value in account," and D. being indebted to B. and the bill sent to B. and accepted by him, and he having given D. notice that he had received it and placed it to D's account, this is such a special indorsement as restrains the negotiability of the bill. Special indorsement.

Anchor and others v. Governors of Bank of England.
615 to 618

268. And if afterwards a forged indorsement purporting to be by D. to pay to E. or order is written upon such bill, and the bill discounted, the person discounting it shall stand to the loss. Forged indorsement, discount.

Ib.

269. And if an agent of A. B. having become insolvent, pay the money for A. and take up such bill, A. may recover back the money in an action for money had and received. 14.

Ib.

A blank indorsement makes the bill payable to bearer, but by a special indorsement the holder may stop the negotiability. *Ib.*

270. An

Douglafs.

Demand on
acceptor, refusal.

270. In an action against the indorser, if the declaration do not alledge a demand on the acceptor, and refusal by him on the day when the bill became payable, it is error and not cured by verdict, for the acceptor is first liable.

Rushton v. Aspinall. Page 654 to 659
(*V. Tindall v. Brown.* 1 D. & E. 167.)

Notice to
indorser:

271. So if the declaration do not alledge notice to the defendant of such demand and refusal by the acceptor. *Ib.*

Per Lord Mansfield, J.—Where plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and therefore there is no room for presumption of proof. The promise alledged to have been made by the defendant is an inference of law, and the declaration does not contain promises from which such an inference can be drawn. *Ib.*

Notice when.

272. If the parties live at a distance, the notice ought to be given by the first post.

Excuse, bank-
ruptcy.

It is not an excuse for not making a demand on a note or bill, or for not giving notice of non-payment, that the drawer or acceptor has become a bankrupt, as many means may remain of obtaining payment by the assistance of friends or otherwise. *Ib.*

For money
won at play.

273. A bill of exchange or promissory note for money won at play is void in the hands of an indorsee, though for valuable consideration and without notice.

Peacock v. Rhodes. 614, 713, 715

Usurious
agreement.

274. In an action on a bill of exchange, if there is a plea of an usurious agreement, and that the bill was given in consequence thereof, the plaintiff may traverse the usurious agreement, and conclude with a verification.

Smith v. Dovers. 412 to 414

Per Buller, J.—When the whole of the matter of the plea is denied in the replication, it must conclude to the country, but when a particular fact alledged in the plea is selected and denied, then the replication must conclude with an averment. *Ib.*

275. If

1 Darnford and East.

275. If the holder give time to the acceptor of a bill of exchange, or drawer of a promissory note after it has been dishonoured, the indorser is discharged.

Holder gives time to acceptor.

Tindal and others v. Brown. Page 167
(v. Dougl. 654.)

276. Notice of a bill of exchange or promissory note being dishonoured, must come from the holder.

Notice of being dishonoured from holder.

Ib.

277. What is reasonable notice to the indorser of non-payment by the drawer of a promissory note, or acceptor of a bill of exchange, is a question of law arising from the particular facts.

Reasonable notice to indorser, question of law.

Ib.

278. Where the note became due on the fifth of October, the indorser's clerk called on the drawer *Donaldson*, at 10 o'clock in the morning, and not finding him at home, left word that the note was due, and desired that the drawer would send for it to his master's and take it up, and on the 6th called again on the drawer, who told him he would take it up that day within the banking hours, which not being done, the other called on the drawer again on the 7th, and not finding him at home, then tendered it to the indorser, and all the parties lived within twenty three minutes walk of each other; the indorser was discharged by the laches of the holder, notwithstanding he had notice from the drawer on the 6th, that he could not pay it. *Ib.*

Id.

279. In this case even if the notice had been given on the sixth, it would have been too late, because the plaintiffs had given credit to the drawer of the note. *Ib.*

Credit given to drawer.

171

280. The notice here proceeded from the maker of the note, but it should have been from the holder himself. *Ib.*

Notice from holder.

281. Where the drawer of a promissory note, or the acceptor of a bill of exchange do not live in the same place, the holder must write by the next post after the bill is dishonoured. *Ib.*

Notice, next post.

168

Per Buller, J.—The purpose of giving notice is not merely that the indorser should know the note is not paid, for he is chargeable only in a secondary degree; but to render him liable, you must shew that the holder looked to him for payment, and gave him notice that he did so. The indorser might have notice from the holder—and yet not be liable,

as

as where it is intimated to him that credit for any time is given to the acceptor, tho' there is no prescribed form of this kind of notice, yet it must import that the holder looks on the indorser as liable and expects payment from him, that he may have his remedy over by an early application.

Tindal and others v. Brown. Page 167

Conditional
acceptance.

1 *Dutnford and East.*

282. Where a bill of exchange was drawn upon A. residing in *London*, by a consignor of goods living abroad, and on its being presented for acceptance, A. said he could not then accept because he did not know whether the ship would arrive at *London* or *Bristol*, on which B. the holder agreed to leave it for some time reserving the liberty of protesting it for non-acceptance in case A. did not accept on a second application, A. said the bill would be paid even if the ship were lost, this is only a conditional acceptance depending on two events, the ship's arriving in *London*, or being lost, and B. having the liberty of refusing such conditional acceptance, precludes himself from recovering against A. by afterwards noting the bill for non-acceptance.

Sproat v. Mathews. 182

Conditional
or absolute ac-
ceptance, ques-
tion of law.

What
amounts to
acceptance.

283. Whether a conditional or an absolute acceptance is a question of law. *Id.*

284. Upon a request to A. to accept a bill, and to draw upon B. for the same sum, the mere act of drawing upon B. does not amount to an acceptance.

Smith v. Nissen. 269

Id.

285. And if after B's. refusing to accept the bill drawn on him by A. A. pays the bill drawn on him for the honour of the drawer, he may recover back the amount of it from the drawer in an action for money paid, laid out and expended. *Id.*

The court will not imply a contract which the parties themselves refused to enter into. *Id.*

Goods in
hands of drawee.

286. A. a creditor of B. to the amount of one hundred and fifteen pounds, took his bill for twenty pounds on C. who had not then nor afterwards any effects of B. in his hands, the bill when due was dishonoured, and no notice thereof was given by A. to B. still A's. demand on the bill was not discharged, but he may sue out a commission of bankrupt against B. and his debt will support it.

Beicherdike and another assignees of Richard v. Bollman.

405
287. Notice

1 *Durnford and Eag.*

287. Notice of a bill's being dishonored by the drawee is not necessary to be given to the drawer if he has no effects in the hands of the drawee, either at the time of drawing, or when the bill becomes due.

Notice, no effects in hands of drawee.

Bickerdike and another assignees of Reisbard v. Bollman.

Page 405

288 *Per Buller, J.*—The notice is necessary upon the presumption, that the bill is drawn upon the acceptor on account of his having effects of the drawer in his hands, and if he has notice of non-acceptance, or non payment, he may withdraw them immediately, but if he has no effects in the other's hands, then he cannot be injured for want of notice—where a bill is accepted, it is *prima facie*, evidence that there were effects of the drawer in the hands of the acceptor.

Notice, why necessary.

Ib.

289. *Per Ashburst, J.* If the drawer has no goods in the hands of the drawee, it is a fraud in itself, and if that can be proved, the notice may be dispensed with, and in this case it appears that at the time of drawing the bill, the drawer so far from having any effects in the hands of the drawee, was actually indebted to him to a large amount

Ib.

290. Where a payee of a bill of exchange indorses it to A. and B. as executors, they may declare as such in an action against the acceptor.

Indorsement to A. as executor.

King and others, Executors, &c. v. Thom. 487

291. In an action by indorsee against the acceptor of a bill of exchange, it is necessary to prove the hand writing of the first indorser, notwithstanding such indorsement was on the bill at the time it was accepted.

Hand writing, first indorser.

Smith v. Chester. 654

292. For *Per Buller, J.* When a bill is presented for acceptance, the acceptor only looks to the hand writing of the drawer, which he is afterwards precluded from disputing, for which reason also the acceptor is liable, though the bill be forged.

Acceptor cannot dispute hand writing, drawer.

655

Per Grose, J. A bill of exchange is no payment to the person in whose favour it is drawn, unless it is indorsed by him - Lord *Mansfield* has said there may be great hardship in this proof of the hand writing of the first indorser in the case of foreign bills.—but *Per Ashburst, J.* The law is so

VOL. I.

N

settled.

settled, and if it were not so, there would be no difference in this case between bills payable to order to bearer, and it would open a door to great fraud.

Smith v. Chester. Page 654

(V. 4 D. & E. 28.)

Notice delayed.

294. If the indorsee of an inland bill not due, present it for acceptance, which is refused and delayed, giving notice to his indorser, the indorser will be discharged.

Goodall and others, v. Dolley. 712

(See *Blesard v. Hurst and another.* 5 Burr. 2670.)

Proposal to pay, ignorant of laches.

295. And a subsequent proposal by the indorser to pay the bill by instalments, made without the knowledge of the indorsee's laches, is not a waiver of the want of notice. *Ib.*

Id.

296. This action was brought by the indorsee against the indorser, and the circumstances were, that a bill of exchange was on the 4th of November, 1786, drawn by one *Lutwich*, on *John Rutter*, in favor of the defendant, at sixty-five days after date, the defendant indorsed it to the plaintiff, who tendered it to *Rutter* for acceptance on the 8th of November, when it was refused; the plaintiff never gave any notice of the refusal till the 6th of January, when by letter the plaintiff informed the defendant merely of the return of the bill, but no circumstance of the tender and refusal by *Rutter*; the bill expired on the 11th, and the next day the defendant made a proposal to pay the bill by instalments. *Heath*, justice, before whom the cause was tried, was of opinion, that this proposal being made under ignorance of the circumstances of the case, that the defendant was discharged by the laches of the plaintiff. *Ib.*

297. *Per Buller, J.*—In the case of *Blesard and Hurst*, there was an express promise to pay by the indorser, in this case there was only a conditional promise to pay, made by the defendant, under a total ignorance of all the circumstances relative to the bill having been dishonored.—If the action had been brought against the drawer, I should have been willing to let in the affidavit, to shew that the drawer had no effects in the hands of the drawee, and that would be like the case of *Bickerdike v. Bollman.* 714

298. *Per Grose, J.*—If there be any difference between the case of *Blesard and Hurst*, (5 Burr.) and the present, it is in favor of this defendant, for at the most this was only a conditional offer to pay, but that was a positive promise by the defendant to take up the bill. *Ib.*

299. The

Durnford and East.

299. The objection arising from want of notice of non-acceptance of a bill of exchange, from the holder to the drawer, is done away, by shewing that the latter had no effects in the hands of the drawee at the time, because the drawer must know that he had no right to draw on the drawee.

No effects in hands of drawee.

Rogers v. Stephens. Page 713

300. *Quere*, how far this rule holds, if the drawer shew from other circumstances, that in fact he sustained an injury for want of such notice.

Quere if injury sustained.

Ib.

301. But at any rate, a subsequent promise by the drawer to pay the bill, is a waiver of the want of notice.

Subsequent promise, waiver of notice.

I.

302. And if on demand made, the drawer answer that "the bill must be paid," it is equivalent to a promise to pay, and it is an admission that he had no effects in the hands of the drawee, and that he sustained no damage for want of notice.

What equivalent to promise to pay.

Ib. 713

303. And it is an admission by the drawer, that he had no effects in the hands of the drawee, and that he sustained no damage for want of notice that the bill had been paid;—it would not be a sufficient excuse for the drawee to say that he had no effects belonging to the drawer in his hands,—in this case it was proved that in point of fact he had none.

Ib.

304. When a foreign bill of exchange, payable forty days after sight, is refused acceptance, and an action is brought in order to charge the drawer, proof of the noting of the bill for non-acceptance, is not sufficient, without proving that it was also protested for non-acceptance, though there be a subsequent protest for non-payment.

Protest for non-acceptance for non-payment.

Ib.

305. In this case the plaintiff declared as payee of a bill of exchange, at forty days sight, for eighty pounds, value received, for the use of *William Calvert*, drawn by the defendant on Messrs. *Berbeck and Black, London*, and which on being tendered for acceptance, was refused, for which it was then noted for non-acceptance, and afterwards protested for non-payment; the defence set up was want of a protest for non-acceptance; and notice to the drawer; this was rebutted by shewing, that neither at the time, or afterwards,

No effects, &c. protest.

afterwards, the drawees had any effects of the drawer's in their hands, Lord *Kenyon* ruled, that under these circumstances, a protest for non-acceptance and notice, were unnecessary.

Rogers v. Stephens. Page 713

Consideration;
original parties.

306. *Per Ashburst J.*—As between the drawer and the payee, the consideration may be gone into, yet it cannot be between the drawer and an indorsee, and the reason is, because it would be enabling either of the original parties to assist in a fraud; this rule is founded purely on principles of law, and not on the custom of merchants.—The custom of merchants only establishes, that such an instrument may be endorsed, but the effect of that indorsement is a question of law, which is, that as between the original parties the consideration may be enquired into, though when third persons are concerned, it cannot.

Lickbarrow v. Mason. 71

307. (Vide 1 *Black.* 408, 445.—3 *Burr.* 1675.—So it seems as to a set off by the drawer for a debt due by payee. 3 *Burr.* 1523, 1527. 4 *Burr.* 2240.)

Interest be-
yond 5 per cent.

308. Where a bill indorsed over, is not duly paid, the indorsee may charge the indorser with interest, exchange, and other incidental expences, beyond the amount of five pounds *per cent.* if such charges are reasonably warranted by usage, and not made a colour for usury.

Auriol v. Thomas. 52

3 *Durnford and East.*

Note indorsed
after due, evi-
dence of pay-
ment.

309. Where a promissory note after it was due and had been noted for non-payment, was indorsed to the plaintiff, who sued the maker upon it, the latter was entitled to go into evidence, to shew that the note was paid as between him and the original payee, from whom the plaintiff received it.

Brown v. Davies, H. 29 *Geo.* 3. 80

14.

310. In this case the defendant was the maker of a promissory note, drawn the 6th *October*, 1788, payable to one *Sandal*, or order, on the 13th *November*, and he had indorsed it to one *Taddy*, who had noted it for non-payment, and afterwards on the 6th *December*, the defendant paid *Sandal*, but neglected to take up the note; *Sandal* having paid *Taddy*, got the note again, and passed it afterwards to the plaintiff, who now brought his action against the defendant;

defendant; it was resolved that the defendant should have been admitted to give evidence of those facts, and that the noting for non-payment, was a strong circumstance of suspicion, and made it incumbent on the party receiving it, to enquire whether it was a good note.

Brown v. Davies, H. 29 Geo. 3. Page 80

311. The same rule holds in all cases where the note is indorsed, after it is due. *Ib.* Indorsed after due.

and *Taylor v. Mather, E. 27 Geo. 3. n. 83*

312. This was an action by indorsee, of a promissory note against the maker, indorsed some time after it was due.

313. *Per Buller J.*—It has never been determined that a bill or note is not negotiable after it becomes due, but if there are any circumstances of fraud in the transaction, and it comes into the hands of a plaintiff by indorsement, after it is due, the jury upon the slightest circumstances, ought to presume, that the indorsee was acquainted with the fraud. *Ib.*

314. Where a bill of exchange was drawn by the defendant and others, on the defendant alone, payable to a fictitious person, (which was known to all the parties concerned in drawing the bill), and the defendant received the value of it from the second indorser, it was held that a *bona fide* holder, for a valuable consideration, might recover the amount of it, in an action against the acceptor, for money paid, or money had and received. Fictitious payee.

Tatlock v. Harris. E. 29 Geo. 3. 174

315. *Per Lord Kenyon.*—The defendant being a debtor to the house of *Lewis and Potter*, drew a bill which he delivered to them, and drew it in terms which could not be proved in a formal manner; he was not only privy to the transaction, but the very negotiator of it, and by drawing it, he put himself in a situation to pay what he was in conscience bound to pay; therefore it was an appropriation of so much money to be paid to the person who should become holder of the bill; we do not mean to infringe the rule of law, that a *chose in action* cannot be transferred, but we consider it as an agreement between all the parties, to appropriate so much property to be carried to the account of the holder of the bill. *Ib.*

316. A bill

3. *Durnford and East.*
- Bearer.** 316. A bill so drawn, is in its legal operation payable to bearer, and may be declared on as such.
Same. Vere v. Lewis. E. 29 G. 3. Page 182
 (See *Ward v Evans. 2 Lord Ray. 930.*)
317. And so held in *Minet v. Gibson. M. 30 Geo. 3. 481*
- Fictitious payee.** 318. In this case also, a bill was drawn in favor of a fictitious payee, which was known to the acceptor, as well as to the drawer.—The name of such payee was indorsed on the bill.—An innocent indorsee may recover on such bill, against the acceptor, as a bill payable to bearer. *Ib.*
- Mutual credit.** 319. Mutual credit may be constituted, though the parties did not mean particularly to trust each other; as if a bill of exchange accepted by A. get into the hands of B. and B. buy goods of A. there is mutual credit between A. and B. though A. do not know that the bill is in B's hands.
Hankey v. Smith. 507
- Acceptance evidence of effects.** 320. The acceptance of the drawee is *prima facie* evidence of his having effects of the drawer in his hands.
Vere v. Lewis. 183
 (V. *Simmonds v. Parminter. 1 Wils. 185.*)
- Judgment by default, writ of enquiry.** If a defendant sued on a bill of exchange, suffer judgment by default, he admits that he is liable to the amount of the bill, and therefore though the bill must be produced on executing the writ of enquiry, it need not be proved.
Green v. Hearne. E. 29 Geo. 3. 301
- Reason for producing bill.** 321. The only reason for producing the bill is, to see whether or not any part of it has been paid. *Ib.*
- Bank notes.** 322. Bank notes are money within the annuity act 17 Geo. 3. c. 26. and may be stated as such in the memorial.
Wright v. Reed. H. 30 Geo. 3. 554
- Tender of bank notes.** 323. A tender of bank notes is good, unless specially objected to on that account, at the time. *Ib.*
 (Vide 1 Burr. *Miller v. Race, 452.*)

4 *Durnford and East.*

In an action by the indorsee, against the acceptor of a bill, drawn payable "to A. or order," the defendant may shew that the person who indorsed to the plaintiff, was not the real payee, though his name be the same, and though there be no addition to the name of the payee on the bill.

Evidence, indorsement, real payee, same name.

Mead v. Young. Mich. 31 Geo. 3. Page 28

324. If a bill payable to A. or order, got into the hands of another person of the same name as the payee, and such person knowing that he is not the real person in whose favor it was drawn, indorse it, he is guilty of forgery.

Id. forgery.

Ib. 28

325. *Per Buller J.*—It is incumbent on a plaintiff, who sues on a bill of exchange, to prove the indorsement of the person to whom it is really payable.—The plaintiff in this case cannot recover, since he derives his title under a forgery.—*Per Grose, J.* A bill of exchange is only a transfer of a *chose in action*, according to the custom of merchants; it is an authority to one person to pay to another, the sum which is due to the first; the drawee by acceptance, only engages to pay the contents to the person named in it, or his order.

Id.

31

Per Ashurst, J.—This is distinguishable from the case of *Miller v. Race*, for there the note was payable to bearer; in such cases the bearer who purchases for a valuable consideration, and without notice of any fraud, is entitled to receive the contents of the bill; and payment to him is a discharge of the drawer.

30

326. Three days grace are allowed on inland, as well as on foreign bills of exchange, and on promissory notes, for the 3d and 4th *Ann. c. 9*, puts the latter on the same footing as inland bills of exchange, in all respects.

Days of grace, promissory note.

Brown v. Harraden. Hill. 31 Geo. 3. 151

327. *Per Lord Kenyon*,—Lord *Holt* particularly adhered to his opinion, before the stat. of *Ann.* that no action could be maintained on promissory notes, as instruments, but that they were only to be considered as evidence of the debt.

Holt's opinion.

Ib.

328. The

Protest bills
payable after
sight.

4 *Durnford and East.*

328. The provisions of the 9th & 10th *W. 3. c. 17.* respecting protests of inland bills, do not apply to such bills as are made payable after sight.

Leffley v. Mills. Hil 31 Geo. 3. Page 170

Quare.—Whether the acceptor of an inland bill be bound to pay it on demand, at any reasonable time of the third day of grace, or whether he be allowed the whole of that day to pay it in, for the court will not take notice of banking hours. *Ib.*

Noting is unknown to the law, as distinguished from the protest, of which it is merely a preliminary step. *Ib.*

Id.

329. *Per Lord Kenyon.*—The case stands thus, that the plaintiff being the original indorser of the note, calls on the defendant, who appears on the record to be a subsequent indorsee, and nothing can be clearer in law, than that an indorsee may resort to either of the preceding indorsers for payment, whereas the present action is an attempt to reverse this.—The plaintiff has stated facts subversive of his title. *172*

330. Therefore an acceptor of such bill, who refuses payment on the third day of grace, is not liable to any charge for the noting of the bill. *Ib.*

Misnomer
of one of the
parties.

331. In an action on a promissory note against three persons, two of whom were stated to be outlawed, and the last pleaded non-assumpsit, the declaration misnamed one of the parties, whose name was on the note; it was adjudged that at the trial, the defendant who had pleaded, might avail himself of this variance between the instrument declared on, and that offered in evidence.

Gordon v. Austin and others. 611

Recovery
against maker
after bank-
ruptcy and cer-
tificate.

332. If the payee of a promissory note pay the amount of it to an indorsee, after the bankruptcy of the maker, he may recover against the maker, notwithstanding his bankruptcy and certificate.

Howis v. Wiggins. Trin. 32 Geo. 3. 714

Per Curiam.—When the plaintiff paid the bill, a new cause of action arose against the drawer, for at the time of the bankruptcy, this plaintiff had no demand against the bankrupt, so that he could not prove the debt under the commission.

715
333. If

4 Durnford and East.

333. If an agent employed by the indorsees of a bill to get it discounted, warrant it to be a good one, his employers are bound by his act, and are liable to refund, if the bill be afterwards dishonoured by the acceptor. Agent, warranty of bill.

Fenn and others, v. Harrison and others. Page 177

334. If separate actions be brought against the acceptor and indorsers of a bill, the court will stay proceedings against any of the indorsers, on payment of the bill and costs of that action, but not against the acceptor, without payment of costs in all the actions. Costs.

Smith v. Woodcock. 691
Do. v. Dudley.

335. The holder of a bill sued the acceptor, and charged him in execution, the latter having obtained his discharge under the lord's act, the holder then sued the drawer, who after paying the bill, sued the acceptor, and charged him in execution, which was held to be regular, the defendants having been charged in execution at the suit of the holder, not being a satisfaction as between the drawer and acceptor. Holder sues acceptor, then drawee, &c.

Macdonald v. Bovington. Trin. 32 Geo. 3. 825

336. *Per Buller.*—The consequence of the defendants not being liable in this action, would be this, that because the drawer was obliged to pay the holder of the bill, the acceptor would be discharged without paying either. *Ib.*

Henry Blackstone.

337. The indorsee of a bill of exchange, having received part of the contents from the drawer, cannot recover more than the residue from the acceptor. Holder receives part from drawer.

Bacon v. Searles. Mich. 29 Geo. 3. 88

338. Where the drawer pays the whole, the acceptor is intirely discharged. Id.
Ib.

339. *Per Lord Loughborough.*—When a bill of exchange is drawn, the drawer orders the acceptor to pay so much of his money to a third person; but if he anticipates the acceptor, and pays the money himself, he thereby releases the acceptor from his undertaking, so that if the acceptor were to pay the bill after notice given him, that the drawer had already paid it, an action would lie for the drawer, against the acceptor, to recover back the money so paid. 89

(Otherwise if indorser pays part. Vide 2 Wils. 262)

240. Drawer

Henry Blackstone.

Drawer
bankrupt.

340. Drawer of a bill of exchange becomes bankrupt before it is due. (v. Bankrupt.)

Brooks v. Rogers. Page 640

Bill refused
acceptance,
not negotiable.

341. A bill of exchange having been refused payment by the acceptor when due, is returned to, and taken up by the drawer, it cannot afterwards be negotiated by the drawer, for it ceases to be a bill.

Beck v. Robley. Trin. 14 Geo. 3. B. R. 89

342. (Vide 3 D. & E. 82.)

Indorsement
in name of part-
nership.

343. On the dissolution of a partnership between A. B. and C. a power given to A. to receive all debts owing to, and pay all those owing from the late partnership, does not authorise him to indorse a bill of exchange, in the name of the partnership, though drawn by him in that name, and accepted by a debtor to the partnership, after the dissolution; the person therefore to whom he so indorses it, cannot maintain an action on it against A. B. and C. as partners.

Kilgour v. Finlyson, and others. Hil. 29 Geo. 3. 155

Id.

344. Neither can such indorsee maintain an action against A. B. and C. for money paid to the use of the partnership, though in fact the money advanced by him in discounting the bill, be applied by B. to the payment of a debt, due from the partnership. *Id.*

Payee against
drawer.

345. *Assumpsit* by payee against drawer of a bill of exchange. (v. *Limitations.*)

Wittershelm v. Lady Carlisle. 631

Fictitious
payee.

346. A. having signed his name to a blank paper duly stamped, and delivered it to B. for the purpose of drawing a bill of exchange, in such manner as B. should think fit, B. draws a bill payable to a fictitious payee, or order, and indorses it for a valuable consideration to C. who is ignorant of the transaction between A. and B; C. may maintain an action against B. as the drawer of a bill payable to bearer, on a count to that effect.

Collins and others, v. Emmet. Hil. 30 Geo. 3. 313

Id.

347. Or C. may recover on a count, stating the special circumstances. *Id.*

348. *Per*

Henry Blackstone.

348. *Per Lord Loughborough.*—A bill of exchange is an authority to pay pursuant to the order of the payee; and it is also an undertaking to pay pursuant to that order, but if there be no person who by any possibility can give such order, the engagement must be to pay the bill, and if the order of the person cannot be procured, and with the knowledge and privity of the parties who make the bill, such a name is put in as cannot give an order, it is in effect and point of law the same thing, as if they had made it payable to the person who held the bill, namely, the bearer.

Collins and others, v. Emett. Page 313

349. If a bill of exchange be drawn in favor of a fictitious payee, or order, with the knowledge of the acceptor, as well as the drawer, and the name of such fictitious payee be indorsed on it, by the drawer, with the knowledge of the acceptor; which fictitious indorsement purports to be to the drawer himself, or his order, and then the drawer indorses the bill to an innocent indorsee, for a valuable consideration, and afterwards the bill is accepted, but it does not appear that there was an intent to defraud any particular person. Such innocent indorsee for a valuable consideration, may recover against the acceptor, as on a bill payable to bearer, *Gibson and Johnson, v. Minet and Feller.* *Hill.* 31 Geo. 3. in the House of Lords, in error. 569

Fictitious payee.

350. Perhaps also in such case, the innocent indorsee might recover against the acceptor, as on a bill payable to the order of the drawer. 569

Id.

Or on a count, stating the special circumstances. *Id.*

351. Where there is a promise to pay a bill of exchange within a fixed time, if during that time no proof be brought of its being already paid, though the promise be broken, (no such proof being brought within the time,) and in an action on the bill with an *insimul computassent*, of the special promise, yet the defendant may prove also under that count, that the debt for which the bill was originally given was paid, and thereby avoid the promise, by shewing that it was without consideration.

Debt for which bill given, paid.

Trin. 28 Geo. 3. *Elmes v. Wills.* 64

Vernon and Scriv.

352. A declaration setting out a good bill of exchange within the custom of merchants, and not otherwise alluding to the custom, is good after verdict. 195

Custom.

353. The

*Vernon and Scriv*Hand-writing
of payee.

353. The defendant having effects of A. in his hands, accepted a bill drawn by A. in favor of B. whom he admits to be a fictitious person. A. passed the bill with B's name indorsed to C. who indorsed the bill to the plaintiff under these circumstances, proof of the hand writing of the payee was dispensed with.

Page 465

Illegal confi-
deration.

354. The drawer of a bill of exchange, is not admissible in an action against the acceptor by the payee, to shew that the bill was given for an illegal consideration. 196

*Espinasse's Case at N. P.*Payable at
house of third
person.

355. If a bill or note is drawn payable at the house of a third person, a refusal by such person is good evidence of the non-payment of such bill or note, though he be no party to it.

Stedman v. Gooch. 3Notice by
letter.

356. A letter delivered at the house of a person who has paid away a bill or note, informing him of the non-payment, is sufficient notice. *Id.*

Note in pay-
ment of a debt.

357. If a person in payment of a debt, gives a bill or note, which has some time to run, the party receiving it, cannot sue on his original debt, until the time which such bill has to run is expired; *after* if such bill or note was of no value. *Id.*

Letter of in-
dorse affecting
indorsee.

358. In an action against the maker of a note, letters of the drawer are not admissible evidence to impeach the indorsee's title, though the indorsement was made after the note was payable.

Cliffam v. O'Brien. 10Acceptance,
what sufficient.

359. It is not a sufficient acceptance of a bill of exchange to say, there is your bill, it is all right.

Powell v. Jones. 17To count,
what.

360. If in discount of bill, the party discounting it gives goods in part, if these goods are of a certain ascertained value, and given at that value, that is not usury, but if the party discounting, makes the holder take them at an higher value, that shall be deemed usury.

Pratt v. Willey. 41

Espinasse's Cases at N. P.

361. A person whose name is on a bill as indorser, cannot be a witness to prove a property in it himself, and that it was indorsed to the plaintiff without consideration, though he has a release. Indorser witness, release.

Buckland v. Tankard. Page 85

362. Where a person takes up a bill of exchange for the honor of any one whose name is on the bill, he becomes an indorsee of the bill, and entitled to all remedies against those whose names are on it. Taken up for the honor, &c.

Mertens v. Winnington. 112

363. Where by the custom of trade, bills are given before the money is received, if the payee's agent who was to pay the money becomes insolvent, before the money is received, the drawer is not liable on the bill. Custom of trade.

Puget de Bras v. Forbes & Gregory. 117

Bond.

Bond.*Holt.*

-Date, delivery.

1. **W**HERE the date is one day, and the delivery on a subsequent day, the plaintiff must declare generally of a bond, dated of such a day, but with a *primo deliberat.* upon such a day, for otherwise it shall be intended to be delivered on the day it is dated.

Cromwell v. Dresdale. Page 122

No date.

2. If a bond has no date, the plaintiff must nevertheless declare upon it, as made at a certain time. *Ib.*

Payment, condition endorsed.

3. Plea of payment of a bond, with condition endorsed, is a good plea, before breach, but not afterwards.

Marle v. Flake. 122

Condition impossible.

4. Where the condition endorsed is impossible, it is void, and the obligation single, otherwise if the condition is part of the *lien*, and incorporated therewith. *Ib.* 122, 148

5. (If the condition be possible at the time of making, but afterwards become impossible by the act of God, of the obligee, or of the law, in these cases, the obligation is saved. *Co. Lit.* 206. *a. b.* And vide *Laughter's Case.* 5 *Co.* 21 *b.*)

Obligor must seek obligee.

6. The obligor must seek the obligee to pay him if in *England*, and no place appointed.

Fitzbugh's Case. 123

Id.

7. If a place be appointed, he may give notice to the obligee to be there at the day; and if he don't come, and the obligor be there, and tenders his money, he saves his bond. *Ib.*

How plead he was ready.

8. If one be bound to pay money to I. S. at a certain time and place, it is not sufficient for defendant to say, that the obligee came not at the time, without saying that he was there, and ready to pay the money; for he must shew that he did all on his part.

Willis's Case. 123

9. A bond

Holt.

9. A bond of 20 years standing, shall be presumed paid. 20 years.
Willis's Case. Page 123

10. When a man under his hand and seal, acknowledges himself to be indebted, that is an obligation. Obligation.
Mawgridge v. Saull. 207, 208

11. If two be bound jointly and severally in a bond, a release to one, releases the several, as well as the joint lien. Joint and several release to one.
Lacy v. Kynaston. 218

Rent whether upon parol or lease by deed, is in equal degree to a bond, and the executor may prefer which he pleases.
Cage v. Adon. 309

12. Assignment by *non-performavit* agreement, *proed* the non-performance being the non-assignment of profits of a voyage, and in the words of the agreement, good after verdict. Non-performance.
Knight v. Keech. 53, 54

13. If a man covenants to procure a conveyance from A. it is no plea to say, that A. has no title,—he is bound to procure it *valeat quantum*. To procure title.
Scounden v. Hawley. 174

14. The difference between assigning a breach in covenant, and in debt on a bond to perform covenants. Breach in covenant, on bond to perform covenants.
Farrow v. Chevalier. 176

15. In debt on bond to perform covenants, the replication must shew a certain breach, but in covenant a general breach is sufficient.—The certainty must be such as to enable the party to plead a former recovery, if a new action be brought. *Ib.*

16. Variance not material between the name signed, and the name in the obligation, as *Erlwin* and *Erlin*, is not material, because subscribing is no essential part of the deed, sealing is sufficient. Variance made in obligation.
Cromwell v. Grunsden. 502

17. Insensible words rejected. *Ib.* Insensible words.

18. An insensible word explained by the condition. *Ib.*

19. An impossible date, is no date. *Ib.* Impossible date.
 20. In-

Insensible
words explain
ed.

Salkeld.

20. Insensible words in the sum of an obligation, may be explained by the condition.

Cromwell v. Grunsden. Page 463

21. As *sex triginta libris*, or *quadrans libris*, &c. *Ib.*

Repugnant
condition, bond
single.

22. Condition of a bond (reciting a debt) not to pay, is repugnant, and bond single. *Ib.* 463

Name, va-
riance.

23 Bond made by *Erlin*, and subscribed *Erlwin*, is no material variance. *Ib.* 462

Joint and se-
veral covenant
not to sue.

24. Bond from A. and B. to H. joint and several, a covenant from H. not to sue, it is no defeasance.

Lacy v. Kynaston. 575

To pay sum
out of salary.

25. A bond by a deputy to pay a certain sum out of his salary or profits, is good.

Gulliford v. De Cardonell. 466

Id.

26. But where it is without relation to the salary or profits, 'tis void. *Ib.*

Variance.

27. A bond to A. *solvendum* to his attorney, declared on as payable to A. no variance.

Roberts v. Harnage. 659

Non est factum,
matter extrin-
sick.

28. If the bond appear good on the face of it, but is void, as made by an infant, or *non compos*; *non est factum* is a bad plea, because the cause of nullity is extrinsic, and does not appear on the face of the deed

Thompson v. Leach. 675

(*V. Strange*, 498, 499.)

29. If deed was good, when plea was pleaded, but after issue joined the seal was pulled off, or the deed cancelled, *non est factum* cannot be pleaded.—*V. Cro.* 120. *Strange.*

1 Lord *Raymond.*

30. Debt against heir upon the bond of the ancestor, *riens per descent* pleaded. Heir gave in evidence an extent on a bond to the King; a copy of the bond, or the bond itself, ought to be proved, the suit being by a creditor.

Sherwood v. Adderly. 734

Assignment

1 Lord *Raymond*.

Assignment of a bond is a covenant, that the assignee shall receive it.

Parishes of Caister & Eccles. Page 683

A bond to a woman with condition to leave her a sum of money not released by intermarriage.

Cage v. Adon. 515

A bond may be explained by the condition.

Cromwell v. Grumfden. 335

Declaration on a bond *cujus dat.* &c. and the bond produced has an impossible date, good, otherwise of *gerens dat.*—For *per Holt*, when the date is impossible, the plaintiff may aver it to be made when he pleased; and though by the profert he has confined himself to a date, yet the *cujus dat.* shall be intended of the delivery; but if it had been *gerens datum*, there could not have been room for such an intendment, and therefore it had been ill. *Ib.* 336

Obligee makes the obligor executor, during the minority of another executor, it is not a suspension.

Caweth v. Philips. 605

Payment after the day, no discharge of a bond at common law.

Nesson v. Finch. 383

Bond to the sheriff to make return, instead of pledges, good.

Blacket v. Crissop. 278

Bond for payment of money of *West Jersey*, declaration for money of *England*, a variance.

Bass v. Firmen. 697

2 Lord *Raymond*.

A variance in the *solvendum* is immaterial, because the first part of the bond makes it payable to the plaintiff.

Robert v. Harnage. 1043

A bond to the King, his executors and administrators, is within the statute 33d *Hen. 8. c. 39.*

The King v. Bradford. 1327

- Strange.*
- Breach particularly. 31. Debt upon a bond, the breach must be set out as particularly, as the covenant.
Stibbs v. Clough. Page 227
- To refund portion. 32. Bond to refund part of a portion set aside in chancery.
Turton v. Benson. 240
- Interest after day. 33. If any interest was paid on an old bond after the day, it must be a plea on the statute.
Moreland v. Bennett. 652
- Indorsement of interest paid, hand of obligee. 34. The indorsement of interest being paid within 20 years, shall be given in evidence, though under the hand of the obligee.
Searle v. Lord Barrington. 826
- The obligor is safer by such an indorsement, than by taking a loose receipt. *Ib.*
- Judgment in this case, affirmed in parliament. *Ib.*
- Id. old bond. 35. Indorsement made by an obligee on an old bond, after the presumption had taken place, not admitted in evidence. *Ib.* 827
- Description of obligee. 36. The *solvendum* in a bond, may contain a sufficient description of the obligee.
Lambert v. Brantbwaite. 945
37. Bond only in particular restraint of trade, may be good, as that the obligor shall not follow a certain trade within half a mile of the obligee's house.
Chefman v. Nainby. 739
38. (If condition of a bond is, that defendant shall buy but a certain quantity of the articles that he deals in, or only of certain persons, or at such and such times, the condition is void as a restraint of trade.
Thompson v. Harvey. *Show. 2.*)
- Penalty, legal debt. 39. Where a bond is forfeited in the life-time of the testator, the penalty is the legal debt, and on the issue what is due, must cover so much assets, but on a bond where the day of payment is not come, the assets only can be covered for the sum in the condition.
The Bank of England v. Morice. 1028

Strange.

40. In the case of a bond or specialty, an usurious contract must be pleaded; on *non-affumpsit* it may be given in evidence. Vide *Salkeld* 675. *Str.* 494.

Lord Bernard v. Saul. Page 498

41. One obligor may be a witness to prove the delivery by the other, where there were three obligors, and the action brought against one only.

Lockart v. Graham. 35

42. (After execution of a bond another obligor added, this is no material alteration, for the bond as to the defendant remains the same. *Zouch v. Cloy*, 1 *Vent.*—but see *Pigor's Case* 11 *Co.*) Another obligor added.

43. Bond given for gaming debt, the statute must be pleaded.

Colborne v. Stockdale. 493

44. Though a bond is taken for a simple contract debt, yet if it is after an act of bankruptcy, the simple contract is not extinguished. 1042

45. An heir of lands by descent, shall not be liable for the debt of his ancestor, any further than to the value of the lands descended, and as soon as he has paid his ancestor's debts to the value of the land, he shall hold the land discharged.

Buckley v. Nightingale. 665

46. Subscribing witness to a bond had been convicted of forgery, on producing the record of his conviction, his hand was proved as if dead.

Jones v. Mason. 833

(Vide *Str.* 34. *Godfrey v. Norris.*)

1 Wilson.

47. Condition to pay by installments, the bond is in force upon the first default.

Installments.

Coates v. Hewitt. 80. Vol. 1.

48. Debt on bond to indemnify plaintiff for what beer he should deliver to J. S. plea that plaintiff delivered no beer to J. S. after the making the bond, replication that he did deliver beer to such amount, without saying before the filing of the bill, is well enough on a general demurrer.

Thrale v. Vaughan. 5

1 *Wilson*

49. Debt on a bond, plea *per dures*, replication that the defendant executed the bond of his own free will, and that he did it not for fear of imprisonment, and concludes to the country, is good.

Tomlin v. Burlace. Page 6

50. Plea of justification under process, must shew it was returned.

Middleton v. Price. 17

51. A sham plea, is not considered as a special plea.

Weld v. Nedham. 29

52. Special action upon the case upon an *assumpsit*, to deliver up a bond pledged upon payment of money, borrowed of the defendant; the breach assigned is, that the defendant refused to deliver up the bond, and held well enough, although it is not laid that the money was paid or tendered, it having been proved at the tryal, that the money was tendered and refused.

Alcorn v. Westbrook. 115

Performance
of condition.

53. An obligor binds himself to leave his children 200*l.* he leaves four children, and gives the eldest an estate in land, and to the other three, 50*l.* a piece.—This is not a performance of the condition.

Taylor v. Bird. 280

Condition,
how construed.

54. Conditions of bonds are to be construed literally in favour of obligors.

Box v. Day. 61

2 *Wilson*.

55. Accord and satisfaction should be pleaded of the money due by the bond, (for payment of the money may be discharged by matter *in pais*), but not of the bond itself, because satisfaction of deed must be by deed.

Preston v. Christmas. 86

56. *Nil debet* to a bond is bad, upon a general demurrer.

Anonymus. 19

57. Debt on a bond to save the plaintiff harmless from expences, by reason of naming a clerk to a curacy, or from suits by reason thereof, plea *non damnificatus*, replication assigns for breach, that the plaintiff was obliged to pay such a sum, by reason of such a nomination, but doth not say how he was obliged, and held well enough upon a demurrer.

Simmons v. Langborne. 11. b.

58. Debt

2 *Wilson.*

58. Debt on a bond, the defendant's plea confesses that the bond is his deed, but that before the 25th day of *October*, 1760, he was a fugitive, and in *February* 1762, returned to take the benefit of the insolvent debtors act; that before the act, he was indebted to the plaintiff in the sum in the condition, who arrested him for it, before he could take the benefit of the act; and being in prison in *November*, 1762, executed the bond, and was discharged; that on the 21st *February*, 1763, he surrendered himself to the King's bench prison; and in *March*, 1763, was discharged at the sessions, under the insolvent debtors act, whereupon he prays judgment, and that his person may be discharged from the execution of the judgment, upon a *general demurrer*; judgment was for the plaintiff, because the defendant had not surrendered himself, and taken the benefit of the act, within a reasonable time after his return from abroad, but was arrested, and continued in gaol five months, when he might have had his *habeas corpus*, and surrendered himself, in order to take the benefit of the said act, much sooner than he did.—332 *b.* 333, &c. *b.*

59. Debt upon a bond, with a condition for the payment of 350*l.* in one month, the defendant prays *oyer* of the bond and condition, and pleads that it was given and executed upon a *wicked and corrupt agreement* to stifle a prosecution for perjury against five persons, and concludes; therefore it is void in law upon demurrer, this was adjudged a good plea. 341 *b.* to 347 *b.*

60. A bond to a lady, with a condition to pay her an annuity in consideration of past cohabitation, is good in law, conscience and honour.

Turner v. Vaughan. 339

Vide 2 *Peere Will.* 432. (Marchioness of *Annandale v. Harris.*)

3 *Wilson.*

61. Defendant had joined in a bond to plaintiff, as surety for one *Baird*, as clerk to plaintiff.—Plaintiff afterwards took another person into partnership;—breach cannot be assigned in embezzling money of the partnership, the bond was for the performance of faithful service to the plaintiff alone.

Bond to a partnership.

Wright v. Ruffel. 530

(Vide *D. & E.* 287, 292.)

62. Bond

1 *Black.*

Cohabitation. 62. Bond for the performance of an agreement of cohabitation with a woman, seduced by the obligor, and for maintenance after his death, is void in law.

Walker v. Perkins. Page 517

(Vide 3 *Burr.* 1568.)

Per Cur.—Here is no virtuous part in the contract, all is calculated for the purposes of prostitution; instead of *premium pudicitiae*, this is *pretium impudicitiae*. *Id.*

30 years standing, no interest paid.

63. Bond of thirty years standing, cannot be read in evidence, if no payment of interest, or other marks of authenticity.

Forbes v. Wale. *M. Vac.* 5 *Geo.* 3. 532

Payment before the day.

64. Payment before the day, is not an immaterial plea in debt on bond.—Plaintiff may reply that he did not pay it on the day alledged, nor at any time before, nor on the day of payment.

Fletcher v. Hennington. 210

65. By stat. 4. & 5 *Ann.* if money has been paid on bond or judgment, though neither at the day nor place, yet if paid at a subsequent day, such payment may be specially pleaded.

2 *Black.*

Interest half-yearly, judgment, failure.

66. On a bond to pay interest half-yearly, and the principal in 3 years, judgment shall be entered on failure of paying interest; and if the interest be afterwards paid, it is no cause to stay the judgment, but only the execution—*Maffsen v. Touchet*, 706. *E.* 10 *Geo.* 3.

Vide 2 *Bla.* 958.—*Str.* 814, 957.—3 *Burr.* 1370.

Penalty reduced.

67. When a defendant is charged in execution with the penalty of a bond, it may be reduced to principal, interest and costs; and interest due on a note of hand, for which no damages were given by the verdict, shall not be covered by this penalty.

Amery v. Smalridge. *E.* 11 *Geo.* 3. 760

Judgment, *scire facias*.

68. In a judgment on a bond to pay an annuity, if a *fi. fa.* be sued out and marked for only part of the penalty, a new *fi. fa.* for subsequent arrears, cannot be taken out, without a *scire facias*, under stat. 8 & 9 *Will.* 3.

Howell v. Hanforth. *M.* 13 *Geo.* 3. 843

69. Pro-

2 Black.

69. Proceedings on a bond for payment of money by installments, and on default to stand in force for the whole sum then due, shall not be stayed on payment of the installments in arrear.

Installments.

Gowlet v. Hanforth. M. 15 Geo. 3. Page 958

(Vide 2 Bl. 706.—3 Burr. 1370.—Str. 814, 957. H. Bl. 76. 2 D. & E. 57.)

70. Defendant cannot take advantage of a void condition in a bond, without praying over and pleading it, not by pleading *non est factum*, for on that issue questions of fact only can be tried.

Void condition, over, *non est factum*.

Colton v. Goodridge. T. 16 Geo. 3. 1108

(Vide 5 Rep. 119.—11 Rep. 26.—2 Hob. 72.)

71. Execution shall not be levied on an annuity bond and judgment for the whole penalty, but only for the arrears of the annuity, and the judgment stands as a security for future arrears.

Ogilvie v. Foley. 16 Geo. 3. 1111

72. Bond to indemnify a parish against a pauper, is forfeited, though the parish chuses to pay a weekly sum for his maintenance in another parish, to avoid the expence of removal.

Allen v. Pensball. M. 18 Geo. 3. 1177

73. Action of debt by the assignee of a bail bond, must be brought in the court where the original action was laid.

Bail-bond.

Morris v. Rees. 838

1 Burr.

74. Limitation of bonds about 20 years, is commonly taken to be the general time; but it has been left to a jury upon 18 years, by Lord *Raymond*.

20 years,

18 years.

The King v Stephens. 434

3 Burr.

75. Just intent of bond, and construction of the act 4 & 5 Ann. c. 16.

Bonafous v. Rybot. 1370

Condition for performance of agreement for cohabitation, void.

Walker v. Perkins. 1568

Joint bond. 5 *Burr.*

76. Action on a joint bond, cannot be brought against one of the obligors *alone*; and if it appears upon the face of the declaration, it may be moved in arrest of judgment.

Rice v. Shute. Page 2611

77. Otherwise, if it is not averred that the other obligor sealed and delivered.

Cabel v. Vaughan. 1 *Vent.*

Cowper.

Consideration, maintenance of bastard.

78. It is a good consideration for a bond, that the obligee will marry and settle a small estate on a servant maid, and maintain a bastard which the obligor had by her; and if the obligor become bankrupt, the bond may be proved under his commission *ex parte*.

Ex parte Cottrell. 742

Indemnity against another bond.

79. Plea to a bond conditioned for payment of money that it was given as an indemnity against another bond, and that the plaintiff has not been damnified, is bad; for parole evidence cannot be given to abate or extend a deed.

Mease v. Mease. 47

80. Vide *Cro. E.* 520.—*Hob.* 246, in the case of a trust.—1 *D. & E.* 622.—Vide *Debt.* 2. *Wils.* 344.

Douglas.

For performance of covenants.

81. A bond for the performance of covenants or agreements, is only a security under 8 & 9 *Will.* 3. *chap.* 11. to the extent of the penalty; the meaning of the stat. of *Will.* was, that the plaintiff should not upon every breach, be obliged to go into a court of equity, to have issues directed of *quantum damnificatus*.

White v. Sealy. 49, 50

(See *Lord Lonsdale v. Church.* 2 *D. & E.* 388.)

Hand-writing of witnesses if not to be found.

82. In debt on bond, if the defendant's admission of the bond is proved, and that the attendance of the subscribing witness cannot be procured, it is sufficient to prove the hand writing of the defendant, and of the witness.

Coughlan v. Williamson. 89

Id.

83. The subscribing witness in this case was of the name of *Steele*, it was proved that a person of that name had gone out to *India* in a ship, of which the defendant was purser, but that enquiry had been made after him, and he could not be found.

Id.

84. If

Douglafs.

84. If the condition of a bond is, that a servant shall not embezzle any money that shall come to his hands, on account of his master, it is necessary for the obligee in an action on the bond, to shew in his replication some particular sum or sums embezzled, and how, or from whom received.

Condition
that servant
shall not em-
bezzle.

Jones v. Williams. Page 203

(Vide 2 Burr. 772, 773.—Str. 227.)

Per Lord Mansfield.—The breach should be particularly assigned, if the money was taken out of the till, that should have been alledged. *Ib.*

85. Evidence of the acknowledgment of the debt by the obligor, is not sufficient to support an action on a bond, conditioned for the payment of money, but the execution must be proved.

Acknowledg-
ment by obligor,
witness.

Abbott v. Plumbe. 205

86. *Lord Mansfield.*—This is a captious objection, but it is a technical rule that the subscribing witness must be produced, and it cannot be dispensed with, unless it appear that his attendance cannot be procured; if the subscribing witness denies the deed, other witnesses may be examined; this was doubted formerly.

(Vide *Henley v. Philips*, 2 Atk. 48. & Str. 34. & 833. & Dougl. 89.)

87. The condition of a bond being to render a fair, just, and perfect account in writing, of all sums received; if the obligor neglect to pay over such sums, it is a breach of the condition.

Bache v. Proctor. 367, 369

Per Buller J.—The palpable mistake of a word, shall not defeat the true intention of the parties; it never could be meant here that so large a penalty should be taken merely to enforce the making out a paper of items and figures.

88. *Per Lord Mansfield.*—In question between the parties, I should exceedingly incline to say, that annuity bonds are within the reason, though not the letter of the act 4 & 5 of Ann. and that payment *after* the day might be pleaded.

Annuity
bond, stat. Ann.

Wyllie v. Wilkes. 505

89. The

1 *Durnford and East.*

20 years.

89. The circumstance of 20 years having elapsed, without any demand made, is *of itself* a presumption that a bond has been satisfied.

Oswell v. Leigh. Page 270

In this case the bond was of 19 years and one-half, and held no bar.

Satisfaction
presumed in
less time.

90. Satisfaction of a bond may be presumed within a less period, if any evidence be given in aid of the presumption; as if an account between the parties has been settled in the intermediate time, without any notice having been taken of such a demand. *Ib.*

No legal bar.

91. But in either case it is only a ground, on which the jury may presume satisfaction, and is in itself no legal bar. 270

For faithful
services,

not extending
to executors.

92. A bond with a condition, that a clerk shall faithfully serve and account for all money, &c. to the obligee and his executors, does not make the obligor liable for money received by the clerk, in the service of the executors of the obligee, who continues the business, and retains the clerk in the same employment, with the addition of another business, and an increase of salary.

Barker v. Parker. 287

Id.
other partners
taken in.

93. But a bond for the fidelity of a clerk, who was taken into the service of the obligees, as a clerk *in their shop and counting-house*, is not discharged by the obligees taking another partner into their house, and the obligees may recover money received by the clerk, after such change of partners.

Barclay v. Lucas. 291. (cited)

(*Vide Wright v. Russell.* 3 *Wils.* 530.)

94. Such a bond is only as a security to the house of the obligees. *Ib.*

95. Courts of law now take notice of trusts, and will allow a plea, that the plaintiff, the nominal obligee in a bond, is not the real owner of it, but trustee for another.

Rudge v. Birch. (cited.) 622

(*Vide Cowp.* 42. and 2 *Wils.* 344.)

(See also *Bottimly v. Brook* (cited) 621.

96. A

1 *Durnford and East.*

96. A bond and warrant of attorney, to confess judgment given by a bankrupt, after his bankruptcy, in order to obtain his liberty, is not barred by his certificate, although the original debt was contracted before.

Given by bankrupt to obtain liberty.

Birch v. Sharland. 715

97. And if the obligor were in custody, charged in execution, it is not necessary that an attorney should be present on his part, at the time of executing the bond and warrant.

Id.

Ib.

2 *Durnford and East.*

98. In an action on a bond, damages may be recovered for more than the penalty.

Damages beyond penalty.

Lord Lonsdale v. Church. 388

99. Therefore in debt on bond, with condition to account for money to be received, the court will not stay proceedings upon paying the penalty into court.

Id.

Ib.

(See *White v. Sealy. Doug. 49.*)

100. Where a woman on her marriage with a copyholder of a manor, where the widows of husbands dying seized, are entitled to their free bench, gave a bond that the son of her intended husband by a former wife, should have possession of part of the copyhold estate, after the death of the husband, on condition of his repairing the part of the house reserved for her, &c. this was held to be good consideration.

Consideration.

The King v. Inhabitants of Lopen. 580

101. Where a person will not rely on the promise which the law will raise, but takes a bond as a security, he cannot resort to an action of *assumpsit*.

Assumpsit in law, waived by.

Toussaint v. Martinnant. 100

102. Therefore if a surety bound with his principal for payment of money by instalments, takes a bond from the principal, conditioned for payment of the amount of the instalments, before the first of them will be due, and before that time the principal becomes bankrupt, and obtains his certificate, and afterwards the installment bond is discharged by the surety, he cannot maintain an action against the principal, for money paid to his use.

Id.

Ib.

103. Where an annuity bond granted by two, becomes void by the neglect of the grantee, in not registering a memorial under 17th Geo. 3. chap. 26. he cannot recover back

Annuity,

consideration.

back any part of the consideration money from the one who was known to be only a surety for the other, and had not in truth received any part of it, notwithstanding they both joined in signing a receipt for it.

Straton v. Rastall. Page 366

2 *Durnford and Ea?*

104. A contract cannot be carried beyond the strict letter of it, as against a surety. 370

105. The stat. 23d H. 6. chap. 9. relating to bail bonds, is a public act, therefore the court will take notice of it, though it be not pleaded.

Samuel v. Evans. 569

106. If it appear in declaration by the assignee of the sheriff on such bond, that the bond is void by the provisions of that stat. the court on motion will arrest the judgment after verdict against the defendant, upon a plea of *non est factum*. *Ib.*

107. A sheriff's bond stated to have been taken on the 4th November, conditioned for the defendant's appearance, on the morrow of *All Souls*, (*scil.* 3d November,) is void by the statute. *Ib.*

Counter-bond,
bankrupt.

108. If A. be bound with B. as a surety for the payment of a sum certain, and take an absolute bond from B. payable the day before the original bond will become due, and B. become a bankrupt before the day of payment; A. may prove this debt under the commission, and B's certificate, will be a bar to an action by A. on the counter-bond, though A. does not pay the original bond till after B. has committed an act of bankruptcy.

Martin v. Court. 640

3 *Durnford and East.*

Arbitration
bond.

109. Debt on an arbitration bond, the declaration stated that the original time given to the arbitrator to make his award, had been enlarged by consent, on demurrer it was held that the penalty could not be recovered for not performing the award made after the time first limited.

Brown v. Goodman. (in note) *E.* 29 Geo. 3. 592

To secure an-
nuity;

110. A. gave a bond to secure an annuity, and before any payment became due, A. lent B. a sum of money, on which it was agreed that B. should retain the payments of the annuity as they became due, 'till that sum was discharged, then

then B. became a bankrupt, and the agreement to retain was held a good plea to an action on the bond by B's assignees for payments accruing after the bankruptcy, being equivalent to a plea of *solvit ad diem*. agreement to retain.

Sturdy v. Arnaud, E. 30 Geo. 3. Page 599

3 *Durnford and East*.

111. Declaration on bond; plea, that it was conditioned for performance of covenants which were to indemnify the obligee from alimony, and debts incurred by his wife after their separation, and that defendant had performed the covenants: Replication that a judgment was recovered against the obligee by a creditor of his wife, and he paid debt and *costs*, of which defendant had notice. On demurrer, the defendant was held liable for the *costs*, as well as the debt; for the covenant to indemnify is general, and it was not necessary for the plaintiff to give notice that an action was commenced: but if it had been necessary, the plaintiff must have recovered on these pleadings, for the defendant has admitted notice.

Indemnity.

Duffield v. Scott. Tr. 29 Geo. 3. 374

112. A bond given by a father on the marriage of his daughter, was conditioned for payment of interest of a certain sum to the husband, or his executors, during the obligor's life, and also for payment of the principal to the husband, or his executors, within a limited time after the obligor's death, if any of the issue of the body of his daughter should be living at that time, there were children of the marriage who all died before the obligor, *leaving grand children*, the grand children were deemed to be *issue* of the body, &c. within the meaning of the condition, and consequently the husband's executors were entitled to recover on the bond.

373

4 *Durnford and East*.

113. A bond given by an incumbent to the patron on presentation, to reside on the living, or to resign, if he did not return to it after notice, and also not to commit waste, &c. on the parsonage-house, is good. Incumbent, patron.

Bagshaw v. Bofsley. 78

(Vide *Partridge v. Whiston*, 4 D. & E. 359.)

114. Debt on bond from the defendant, on his presentation to a living, the condition was to resign when the patron's son was ordained, and could be presented,—held not simoniacal.

Simony.

Partridge v. Whiston. 359

115. If

4 *Durnford and East.*

One partner
executes for
another.

115. If one partner execute a bond *in the presence of the other*, and by his authority, it is a good execution by both, though only sealed once.

Bail v. Dunsterville and another. Page 313

To secure an-
nuity.

116. To debt on an annuity-bond, defendant pleaded no such memorial as the statute requires, to which plaintiff replied that there was a memorial which contained the names of the parties, &c. and the consideration for which the annuity was granted; the defendant rejoined, that the consideration was untruly alledged in the memorial to have been paid to both obligors, for that one of them did not receive any part of it; the rejoinder was held bad,—first, because it was a departure from the plea,—secondly, because the fact alledged respecting the memorial, did not contradict the replication, for the consideration might have been paid to the other obligor on account of himself and the co. obligor, or to a stranger for them both.

Praed v. the Dutchess of Cumberland. Hil. E. 32 Geo. 3.
585

Espinasse's Cases at N. P.

Delivery, exe-
cution, acknow-
ledgment.

117. If the obligor of a bond acknowledges to the subscribing witness that he executed it, it is sufficient,—the bond was brought ready signed and sealed, and obligor desired witness to sign his name.

Powell v. Blackett. 97

Solvit post diem.

118. Where the obligee of a bond receives the whole principal after it is payable, he cannot recover interest in an action on the bond, as *solvit post diem* is a good plea.

Dixon v. Parkes. 110

Case.

1. **W**HERE the law has made no provision ; or rather where no general action could well be framed before-hand, the ways of injuring, and methods of deceiving, being so various ; any person is allowed to bring special action on his own case, which is a liberal action.—These actions are founded in some fraud or deceit in contracts, or some secret injury to a man's right or property, and are said to arise from a non-feasance, mal-feasance, or mis-feasance.

Nature of.

1 *Bac. Abr.* Page 44

2. The action of trespass or transgression on the case, is an universal remedy given for all personal wrongs and injuries without force, so called, because the plaintiff's whole case or cause of complaint is set forth at length in the original writ where any special damage arises, which could not be foreseen and provided for in the ordinary course of justice. The party injured is allowed both by common law, and the stat. *West. 2. c. 21.* to bring a special action on his own case, by a writ formed according to the peculiar circumstances of his own particular grievance ; for wherever the common law gives a right, or prohibits an injury, it also gives remedy by action ; and therefore, wherever a new injury is done, a new method of remedy must be pursued.—If the injury is *immediate* to person or property, trespass lies.—If the act is not immediately injurious, but only by consequence, and collaterally, or where there is no act done, but only a culpable omission, case is the proper remedy.

3 *Black. Comm.* 122

3. In a special action on the case, the act is in itself indifferent, and the injury only consequential, and therefore arising without any breach of the peace.

Act in itself
indifferent.

Ib. 153

Holt.

4. Credit was given on the defendant's affirmation at the time of the sale, that the oxen sold were his—an action lies.

Property in
vender.

Crosse v. Gardner. 5

5. Case

*Holt.*Water-course
ancient,

5. Case for diverting a water-course, the mill ought to be proved to be ancient.

Heblewait v. Palms. Page 5, 6

Bailiff.

6. Case lies against a bailiff.

Wilkins v. Wilkins. 6

Public nuisance.

7. Action for a public nuisance, lies not without special damage.

Pain v. Partridge. 6, 7, 10, 11

Commissioners.

8. Commissioners to examine, may maintain an action *pro opera et labore*.*Stockton v. Collison.* 7Goods marked,
action before delivery.

9. The vender may maintain an action before delivery of the goods where they are marked and sealed, for then the property is altered immediately, and they remain only as a security for the money.

Knight v. Hopper. 8By master of
ship.

10. Lies for a master of a ship obstructed in his voyage, for his particular loss only.

Pitts v. Gaince & Foresight. 12

Bailment without reward.

11. It lies for mis-feasance, though no consideration paid.—In this case, defendant undertook without consideration to take up a hoghead of brandy in a cellar, and safely lay it down in another cellar, but for want of care the cask was staved.—Per *Holt*, the party has no benefit if he takes a trust upon him, he is obliged to perform it.*Coggs v. Bernard.* 13Executory
agreement.12. Otherwise if the agreement had been executory, as that he assumed to carry it, and did not. *Ib.*

Negligence.

13. Lies against an innkeeper for negligently keeping a horse.

Stanyon v. Davis. 13, 14Frightening
wild fowl.

For shooting a gun, and frightening wild fowl coming to the plaintiff's decoy.

Keeble v. Hickeringall. 14 to 20Nuisance,
lessee of, &c.

14. If a man have a way over the land of another, and he stops the way, and then demises the ground.—Action lies against

against lessee of him who created the nuisance, for continuing it.

Arnold v. Jefferson. Page 498, 499

15. *Quoddam Edificium* good ; for a building may not have a proper name. Description. *Ib.* 498

16. Stopping a prospect, is not a nuisance. Stopping prospect. *Ib.* 499

17. One who had an house and lights, time out of mind, the owner of the next field built a shed which stopped the lights, and then made a lease thereof to another.—An action does not lie against the lessee, because it would be waste in him to pull down the shed, but the plaintiff may stand on his own ground, and abate the nuisance. Abate nuisance, lessee of. *Ib.*

18. If a river runs contiguously between the land of two persons, each of them is owner of that part of the river which is next his land, of common right, and may let to the other, or to a stranger.—If one has a river, and for want of scouring it, the neighbouring land is overflown, he is indictable for it.

The King v. Wharton. 499.

(Vide 9 Co. 58.—*Cro. E.* 218.—3 *Wils.* 46.—2 *Black.* 924.)

19. For stopping up lights, formerly averred that they were ancient lights.—Course now altered. Stopping lights ancient. *Roswell v. Prior.* 500

20. Action on the case in the nature of a writ of conspiracy, lies for maliciously causing R. to be indicted of a riot,—but express malice ought to be proved. Conspiracy, express malice. *Savill v. Roberts.* 150

21. Circumstances of evidence may shew a chain of malice. Malice. *Muriel v. Tracy.* 151

22. In the action on the case, the declaration ought to say without probable cause, &c. Probable cause. *Ib.*

23. Three sorts of damages, each a foundation for an action,—first, in fame or credit,—second, in person,—third, in property. Damages 3 kinds. *Savil v. Roberts.* 193, 194

Salk.

Bailment
without reward.

24. If one undertakes to do a thing without hire or reward, no action lies for the non-feasance.

Coggs v. Bernard. Page 26

Id.

25. But *contra*, where he enters upon the doing it, and any mis-feasance be through his neglect or mismanagement.

Ib.

(Vide *Holt* 13.)

26. Action lies not for refusal of a public right (to pass a common ferry) without some special damage.

Payne v. Partridge. 12

27. Action lies for continuance of a nuisance, after an under-lease.

Rosewell v. Prior. 460

28. (Vide *Cro. J.* 473. *Cro. Ch.* 325. 4 *Burr.* 214.)

29. Where a nuisance has been continued after a former recovery in an action for the same, the plaintiff must declare for a continuance of the nuisance,—if he declares barely for the nuisance, the former recovery may be pleaded in bar.

Johnson v. Long. 10

Repairing
wall.30. It lies for not repairing the partition wall of a privy *pro defectu cuius*, filth ran into the plaintiff's cellar.

Tenant v. Golding. 22, 360

31. Case doth not lie for breaking a wall in which the plaintiff had no property, and which was between the plaintiff's house, and an alley or street, and making a common passage through the wall, for if it be the plaintiff's, trespass lies, and if it be not, this action doth not lie.

Keb. 577. Pl. 38.

32. Case for a nuisance for making a lime-kiln without laying it to be upon the defendant's own soil, was held bad, because if it were upon the soil of the plaintiff, trespass was the proper remedy.

12 *Mod.* 382.Stopping way
to colliery.

33. But for stopping a way leading to the plaintiff's colliery, with intent to deprive him of the profits, &c. though a special damage was shewn, the court were divided.

Iveson v. Moore. 15

34. For

Salk.

34. For 'tis not sufficient to say customers would not come, but must shew they were coming, and were hindered thereby,—the particular injury to the special damage must be sufficiently set forth. Special damages.

Iveson v. Moore. Page 15

35. If plaintiff bring an action on the case for a rescue, which lies at common law, he shall recover treble costs and treble damages.

Lawson v. Storie. 205
(Vide stat. 2 Will. & M. S. 1. C. 5.)

36. It lies by the owners for arresting a ship by process of the admiralty, *infra Corp. Com.* whereby his voyage was lost. Loss of voyage;

Child v. Sands. 31

37. Case lies by A. who declares not as owner, but as an officer of the ship, for a particular loss, the consequential injury in the loss of the voyage, though he might have had trespass for the tort itself to the possession.

Pitts v. Gaince. 10

38. Lies not by a burghers against a constable for refusing to take his vote for a parliament-man, *per 3 contra Holt.* Refusing vote.

Ajby v. White. 19, 20.

39. Nor against an officer for a false return to parliament, but on the stat. of 7, 8 Will. 3. *ibid.* For false return.

(Vide *Pa.* 21, 503, 504.)

40. Nor against a post-master for Exchequer bills lost out of a letter delivered at the post-office. *Per 3 contra Holt.* Postmaster.

Lane v. Cotton. 17

41. But *per Holt*,—an officer is responsible both for himself and deputies, whether his trust arise by the common law, or by statute. Officer, deputy.

Ib. 18

42. As innkeepers, carriers, &c. taking rewards, are answerable for those that act under them. Innkeeper answerable for servants.

Ib.

43. And whoever takes a public employment, is bound to save the public, &c. therein. Public officers;

Ib. 18

44. And a deputy is also chargeable as a wrong doer, and his act may forfeit the office of the principal. Deputy.

Ib.

Salk.

Fire, negligence.

45. It lies for negligently keeping his fire in a field, whereby another's corn is burned, or other damage done.

Turbervil v. Stamp. Page 13

Id — Lessee at will.

46. But not for negligently keeping fire, &c. against a lessee at will by a lessor, seized in fee, for he had it in his power to secure himself by covenant.

Pantam v. Isbam. 19

Id.

47. *Sectus*, if the lessor has only a term for years or life, or if a stranger is damnified, because he is answerable over to his lessor. *Ib.*

Id.

48. If a lessee assigns his whole term, and the assignee burns the house by negligence, that action lies not.

Turbervill v. Stamp. 13

Id.

49. *Contra*, where he assigns only part thereof, and it appears he has only a residuary interest. *Ib.*

Procuring another to sue.

50. It lies where a person not concerned, procures one to sue another without cause.

Savil v. Roberts. 14, 15

Bringing action where nothing due.

51. Lies not for bringing an action where nothing is due, without some special collateral wrong be shewn.

Ib. 14

Maliciously holding to bail.

52. In case for maliciously holding to special bail, the declaration ought to shew the sum due, and the process specially, and that the first action is determined.

Robins v. Robins. 15

Deceit, merchant, factor.

53. Action on the case for a deceit, plaintiff set forth, that he bought several parcels of silk for

silk; whereas it was another kind of silk, and that the plaintiff well knowing this deceit, sold to him for

silk,—on not guilty, it appeared in evidence that there was no actual deceit in the defendant, the merchant, but in his factor beyond sea; and *per Holt*, the merchant is answerable *civilitur*, tho' not *criminaliter*, for the deceit of his factor.*Horn v. Nicholls.* 289

Warranty, deceit.

54. It lies on warranty of a horse to be found that wants an eye, &c.

Butterfie'd v. Burroughs. 211

55. This

Salk.

55. This infirmity might be, and must be intended to be secret, and tho' a warranty must be part of the very contract, the payment here was afterwards, and it was that completed the bargain, which was imperfect without it. Secret infirmity, warranty, time of contract.

Butterfield v. Burroughs. Page 211

56. (If a person warrant a thing, tho' ignorant of its value, he is liable. *Yelv. 20. Cro. J. 4.*)

57. Where the seller has the possession of chattels, the bare affirming them to be his, makes a warranty, for the having possession is a colour of title. Deceit, possession, warranty, property, chattels.

Medina v. Stoughton. 210

(Vide *Stuart & Wilkins. Dougl. & Pasley v. Freeman, 3 D. & E. & Strange 414.*)

58. *Aliter*, where he has not possession, for there is room to question his title, and *Caveat Emptor.* *Ib.* 211 Id.

59. But such affirmance is no warranty in sale of lands, whether the seller be in or out of possession. *Ib.* Id. —Lands.

60. Deceit lies for affirming to a purchaser that the rent is more than it is. Deceit, rent less.

Rifney v. Selby, 211

(Vide *Lord Raymond 1118.*)

61. The marshal is not chargeable in escape, 'till notice of the commitment. Escape.

Watson v. Sutton. 272

62. Where a person is acknowledged to be in actual custody, delivering a writ to the sheriff against such person, is an arrest in law, and the sheriff or officer will be liable in case of an escape,

Jackson v. Humphreys. 273

(Vide *Str. 901.*)

63. Escape of a person in custody on an erroneous process, the sheriff held liable. Escape, erroneous process.

Shirley v. Wright. 273

(Vide *3 D. & E. 126.*)

64. An

- Conspiracy,
nothing executed. 1 Lord *Raymond*.
64. An action will not lie for a conspiracy, if nothing be put in execution.
Savile v. Roberts. Page 378
- Trespass, case. 65. Trespass and case not to be joined.
Courtney v. Collet. 273, 274
(Vide 2 Lord *Raym.* 1399.—*Carthew* 435.—2 *Roll.* 139.
2 *Burr.* 1114.)
- Postmaster. 66. Case does not lie against the postmaster-general for Exchequer bills taken out of a letter in the office.
Lane v. Sir Robert Cotton. 646
- Against carrier,
and trover. 67. On the custom against a carrier, and *trover* cannot be joined.
Dalston v. Janson. 58
- Promise of
marriage. 68. An action for not performing a promise of marriage, is mutual.—Promise need not be in writing.
Harrison v. Cage. 386
- Fire, negli-
gence, lessee. 69. If lessee for three years, of a house, demises it for two years in respect of his reversion, he may have an action against the lessee for two years, if the house be burnt by his default, because he is liable over to the action of the lessor,—the declaration ought to shew that he had an interest in term then to come, when the house was burnt.
Hicks v. Downing. 99
- Id. 70. Case for negligently keeping his fire in his field.
Turbarville v. Stamp. 264
- Boar accustomed
to bite. 71. Case for knowingly keeping a boar accustomed to bite animals, &c. good after verdict, notwithstanding the uncertainty of what kind of animals.
Jenkins v. Turner. 110
- Ox breaking
loose. 72. Case against a butcher for his ox breaking loose, &c.
Mason v. Keeling. 606
- Monkey. 73. Against the owner of a monkey for its biting, &c.
Ib.
(Vide *Salk.* 662.—1 *Str.* 1264.)
- Rescous. 74. An action of *rescous* upon the stat. 2 *Will. & Mary,* chap. 5. is a penal action.
Bellasis v. Burbriche. 172
75. Case

1 Lord Raymond.

75. Case lies against a surgeon, or other person of the medical profession for neglect or ignorance.

Doctor Greenvelt's Case.

Page 214

(Vide 2 Wils. 359.)

76. Case for erecting a new mill, 3 Aug. *per quod* the plaintiff lost the profits and use of his meadow from 2 July, judgment arrested.

Erecting a new mill.

Prince v. Moulton.

248

77. Tenant for years, may bring an action against a wrong doer, without a prescription.

Tenant for years against wrong doer.

Dorney v. Cashford.

266

78. It is sufficient for him to declare *habere debuit viam*, &c. (see *Strode v. Birch*, 4 Mod. 18.)

Que estate, tenant for years.

But here the plaintiff declares that he is possessed for a term of years of a house, and that he and all those whose estate he hath in the house, time whereof, &c. *habuerunt et habere debuerunt*, a way, &c. he has therefore laid *que estate* in himself when he is but lessee for years, which is impossible, for he cannot have the estate of any other, but only his own.

Ib.

79. Action for beating a servant *per quod servitium amisit*, is taken away by the death of the servant.

Beating a servant *per quod*, &c.

Fetter v. Beal.

339

80. Case for stopping a highway, whereby customers could not come to the plaintiff's colliery.

Stopping highway.

Iveson v. Moore.

486

81. An action does not lie for laying down an ancient ferry.

Laying down ancient ferry.

Ib. 494

In case for holding to bail, &c. the process ought to be set forth.

Holding to bail.

Robbins v. Robbins.

503

82. A master of a ship may have case for detaining his ship *per quod*, &c. but an owner must bring trespass.

Master of ship, owner.

Pitts v. Gaince.

558

83. A bailee may maintain trespass, but then he ought to declare on his possession.

Bailee, possession.

Ib.

84. Case

Farrier re-
fusing, &c.

1 Lord *Raymond*.

84. Case against a farrier for refusing to shoe a horse.

Lane v. Cotton. Page 654

Stopping lights.

85. Tenant of a piece of ground erects a house which obstructs his neighbour's lights, and then demises it: an action lies against him for the stopping of the lights after the demise.

Rosewell v. Prior. 713

2 Lord *Raymond*.

Habuit et ba-
bere debuit, ways,
wrong doer.

86. General declaration that plaintiff *habuit et habere debuit*, a way over the defendant's close, bad on demurrer,—the plaintiff ought to shew his title to such a way, for such a general declaration is only good against a wrong doer,—but this is made good by the general issue being pleaded.

Jones v. Hammond. 751

False return.

87. Case lies against particular persons who procure a false return to be made in the name of a corporation.

The Queen v. Mayor of Thetford. 848

88. An action merely for debauching a man's daughter, is an action on the case, 1032

89. (Vide *Trespass*, 3 *Wils.* 18.—3 *Burr.* 1878. & 2 *D.* & *E.* 166.)

90. In case for a false return of *non est inventus* to a *capias ad satisfaciendum*, the whole debt given in damages.

1411

Keeper of
livery-stables,
horse damaged.

91. Case lies against the keeper of a livery-stable for damaging a horse delivered to him to keep for a reward, without shewing that the defendant agreed to keep him; for the agreement to keep, must be intended a reasonable price being paid.

Stanian v. Davies. 795

Counts falsify
each other.

92. An action for nursing a child for so many weeks, and other counts for nursing the same child for the same weeks, so that the counts falsify one another.—Ill—(that is the word *other* was omitted.)

Hart v. Langfitt. 842

93. An action lies for refusing the plaintiff's vote.

Asbby v. White. 942

94. (In

2 Lord Raymond.

94. (In this case of *Asbby v. White*, one objection was, that it was an action of the first impresson,—it must be confessed, that the novelty of an action may frequently be fairly urged as a strong presumptive argument against its lying more particularly where the right, which is the foundation of the action, is admitted, and the mode of relief (as in this case) is the only thing controverted.

Hargrave, Coke's notes, 81.—Ib.

95. A declaration for shutting the plaintiff out of a vestry held in a room,—*ubi tales assemblationes tenere solite et consueverunt*,—held ill, for not shewing their right to the room; for in actions of this nature a right must be shewn in the thing claimed, and then a disturbance. Right, disturbance.

Phillibrown v. Ryland, 1388

96. Case lies against a bishop for disturbance in presenting to a church. Bishop, presentation.

Asbby v. White. 948, 956

97. Case lies for not repairing his privy, whereby the filth came into the plaintiff's cellar, without shewing a title to the cellar. Not repairing privy.

Tenant v. Goldwin. 1089

98. Case maintained by one possessed of houses, against the owner of a brew-house, for causing water to run near the foundation, &c. Not repairing wall.

Hoare v. Dickinson. 1568

99. For not doing what ought to be done of common right, an action lies without shewing a particular title or charge,—as not repairing his own house, so as to injure mine. Particular title, common duty.

Tenant v Goldwin, 1091

100. Case for falsely affirming to a purchaser, that houses are let at such a rent lies, where the plaintiff depends upon it, and makes no further enquiry.

Lysney v. Selby. 1118

101 Warranty before the sale, being part of the contract, is good to maintain an action, not after. Warranty. *Ib.*

(Vide 2 Cr. 630. 1 Vent. 269.)

102. Case

2 Lord *Raymond*.

Certainty, de-
scription.

102. Case for negligently running down the plaintiff's barge laden with goods, or for burning his house and goods, the goods must be particularly mentioned,—otherwise no evidence can be admitted of them.

Martin v. Henrickson. Page 1009

Certainty,

103. An action for so negligently keeping sheep,—*quod multipliciter deteriorata fuerunt*, &c, well,

Davis v. Stannion. 1041

Strange.

Warranty,
subsequent sale.

104. If the first contract with warranty be broken off, the warranty will not extend to a subsequent sale.

Anonymous. 414

105. Case lies for turning an ancient water course,

Vernon v. Goodrich. 5

106. Case lies against the master, for negligence of his servant.

Jarvis v. Hayes. 1083

107. Case lies against sheriff, by landlord or his executor, for removing goods off the premises, before payment of years rent, having had notice.

Palgrave v. Windham. 212

108. (2 *Wils.* 140, 141. 1 *Str.* 643. 2 *Str.* 787, 1 *Str.* 92.)

109. Case lies for false return against sheriff, on *non est inventus*, to writ of *mesne process*.

Powel v. Hord. 650

110. (False return.—Vide *Salk* 12. 2 *D. & E.* 603.)

Easement, title,
possession.

111. Action on the case for the disturbance to an easement, A. claims a water-course over the lands of B. if the plaintiff declares on the possession only, and the defendant pleads a freehold, the plaintiff must shew a title in the replication, and must not barely rely on traversing the defendant's title.—Possession is only good against a wrong doer, and therefore plaintiff must shew a title, where he claims an easement out of the defendant's soil.

Vernon v. Goodrich. 5

112. (Vide *Cro. C.* 499, *Cro. J.* 43. *Cowper* 454.)

113. In

Strange.

113. In case a justification may be given in evidence, as in case for breaking a horse, defendant gave in evidence that the plaintiff's horse and cart were placed before his door, so as not to let his own cart come up, and that he whipped them away. Justifiable in evidence.

Slater v. Swann. Page 872

(Vide 1 *Wils.* 45.)

114. Where the act is lawful as the fixing a spout, and the consequence is injurious, the remedy is by case, and not trespass. Consequential damage.

Reynolds v. Clarke. 634

115. Case lies at the suit of a parishioner, for excluding him from the vestry-room, but it must be averred, that the parish had a property in the room, and a right to meet there.

Phillibrown v. Ryland. 624

116. Trespass on the case, is not within the statute *Will.* Costs.
3. that gives costs to one defendant acquitted.

Dibben v. Cooke. 1005

117. Lies for knowingly keeping a dog used to bite, though the damage happened by accidental treading on him, the *scienter* is the gist of the action. Keeping dog used to bite.

Smith v. Pelab. 1264

Hardwicke.

118. If a judge makes a mistake in any thing within his jurisdiction, an action will not lie against him, or his officer. Against a judge.

Gwin v. Poole, 2 Lutw. 1560 (cited) 61
Smith v. Boucher.

Wilson.

119. In an action upon the case, any matter of justification may be given in evidence on the general issue, which shews the defendant not guilty of the grievance laid in the plaintiff's declaration, and destroys the plaintiff's right of action;—in trespass *vi et armis*, on the contrary the special matter must be pleaded, and then the defendant must confess and avoid. Justification in evidence, trespass.

Barber v. Dixon. 45

(Vide 2 *Str.* 872. *Slater v. Swann*)

120. Action

1 *Wilson.*

120. Action on the case for a false return, lies against a sheriff who returns *scire feci* to a *scire facias*, when in fact he had given no notice.

Griffith v. Walker. Page 330

121. In action for an escape, the defendant shall not be allowed to plead or give in evidence, that the first suit was improperly commenced; he could not justify under the process, nor shall he be allowed to take advantage of any irregularity.

Bull v. Steward. 255

122. For diverting a water-course, if one have ancient pits in his lands, which are replenished by a rivulet, he may cleanse them, but cannot change or enlarge them.

Brown v. Best. 174

2 *Wilson.*

123. It lies for suing one in an inferior court, that hath not jurisdiction of the cause,

Goslin v. Wilcock. 302

Suing in inferior court
wanting jurisdiction.

124. The declaration ought to alledge, that the defendant knew that the inferior court had no jurisdiction of the cause.

125. Case will lie for a possibility of damage, as for persuading A. not to come and sell his wares at plaintiff's market.

422

Case, trespass.

126. The difference between *trespass* and *case*, is that in *trespass* plaintiff complains of an immediate wrong, in *case* of a wrong in consequence of another act.

Gates v. Bayley. 313

127. Case for misfeasance, which is the cause, but not the very point of the action, may be laid *vi et armis*. 9 Co. 50. Cr. C. 325. 2 Roll. 139. Hob. 180. but not case for nonfeasance. 9 Co. 50. b. and whenever a declaration may be laid *vi et armis*, it may conclude *contra pacem*. 1 Com. Digest 131. and see *Lutw.* 1510.

128. Case lies against an attorney, for neglecting to charge a person in execution at his client's suit, according to a rule of court, although it seems it was rather want of judgment, than negligence.

Ruffel v. Palmer. 325

129. It

Wilson.
129. It lies against a surgeon and an apothecary, upon a joint undertaking, for unskilfully disuniting the callous of the bone of the plaintiff's leg, after it was set. Surgeon, unskilfulness.

Slater v. Baker & Stapleton. Page 359

130. It lies for holding one to bail in an inferior court, when no more than 30s. was owing. Holding to bail.

Smith v. Cattle. 376

131. It lies against a gaoler for an escape upon *mesne process*, though the prisoner returns to prison on the same day, and plaintiff proceeds against him.

Ravenscroft v. Eyles. 294

Wilson.
132. It doth not lie against justices of the peace for refusing to grant to one a license, to keep an inn or an ale-house. Justices refuse license.

Basset v. Godschall, and others. 121

133. Action for disturbance of common, by one commoner against another. Disturbance of common.

Atkinson v. Teasdale. 278

134. An action upon the case lies against the deputy postmaster of *Ipswich*, for wrongfully keeping and detaining the plaintiff's letters, directed to him, an unreasonable time, which defendant ought to have delivered to him at his place of abode in *Ipswich*. Postmaster.

Rowning v. Goodchild. 443

135. An action on the case, lies against paviers, employed by the commissioners appointed by parliament, for paving the streets, for raising the pavement in the front of the plaintiff's houses, by which the passage and lights to the houses are obstructed. Stopping passage and lights.

Leader v. Moxon and others. 461

Blackstone.
136. Trespass, and not case, will lie for encroaching on a lead mine, though the plaintiff has no property in the soil above the mine, but only a liberty of digging. Lead-mine, no property in soil.

Harker v. Birkbeck. T. 4 Geo. 3. 482

Per Lord Mansfield.—Trespass is a possessory action, and may be maintained against a wrong doer, even by a *cestui que trust* in possession. *Ib.*

137. In

Satisfaction
pending suit.

1 *Blackstone.*

137. In actions on the case, satisfaction made to the plaintiff pending the suit, will take away the remedy.

Bird v. Randall. Page 388

Bill in equity.

138. *Per Lord Mansfield.*—Actions on the case differ from formal precise actions, which are *stricti juris*, they are almost equivalent to a bill in equity; whatever appears upon the trial to take away that equity, will take away the remedy;—the plaintiff must recover out of the justice of his case.—Actions upon trespass, or joint contracts, are formal precise actions, which are *stricti juris*.—Trespassers are all equally principals in joint contracts; all are bound to answer in *solidum*, and the party may take out execution against one only, and have only one satisfaction.

Lies the' another remedy,
commission of
bankruptcy.

139. Action on the case lies, for maliciously suing out a commission of bankruptcy, notwithstanding the special remedy given in the statutes of bankruptcy.

Brown v. Chapman. 427

2 *Blackstone.*

Case and trover
joined.

140. Case for obstructing a wharf, contrary to agreement, and *trover* may be joined.

Mast v. Goodson. 848

141. *Per Blackstone J.*—Originally all actions on the case were for torts, till the introduction of *assumpsits* on *mutuctus*, and other debts, in the time of Queen Elizabeth. (*Slade's Case* 4. Co.) in order to give the court of King's-bench an original jurisdiction in actions of debt, wherein (as in cases of detinue, covenant, and account), no original is by law returnable out of chancery; since that introduction, we must distinguish whether the particular action on the case before the court, is founded on tort, or on contract; if the former, it may be joined with any tort, if the latter, with any contract. *Ib.*

Lies, tho'
another remedy,
covenant.

142. Case in nature of waste, will lie against tenant, for years after the expiration of his term, as well as covenant, for the breach of those contained in his lease.

Kin'lyside v. Thornton. M. 17 Geo. 3. 1111

Subsisted at
common law.

143. *Per. Black. J.*—It by no means follows, because in cases unprovided for by the register, the stat. of *Westminster* 2. directs an action on the case to be framed, that the action on the case in general, did not subsist at common law. *Ib.*

2 *Blackstone.*

Per De Grey C. J.—Because the landlord by the special covenant, requires a new remedy, he does not therefore lose his old.

Kinlyside v. Thornton. Page 1111

144. Judgment for defendant in *trover*, not pleadable in bar of action on the case, for the value of the same goods, it not appearing that the question was the same. Judgment in *trover*, bar.

Hitchin v. Campbell. 779

145. One personal action not going into judgment, is no bar to another for the same cause of action; but if judgment is had on the merits, then it bars all personal suits for the same cause of action.

Id. 830

146. In an action on the case against a tenant, for not performing his agreement, the estate of the lessor is an immaterial averment, if the tenant has had the fruit of his lease. Agreement, landlord, tenant.

Winn v. White. 840

Per De Grey.—The rule is, that on the general issue in an action on the case, all material averments are denied, and put in issue, but nothing else. Material averments. *Ib.*

147. In case in nature of deceit, to reverse a recovery of lands in ancient demesne, all the parties to the recovery must be before the court. Deceit.

The King v. Hadlow. 1170

1 *Burr.*

148. Action on the case lies for nuisance to lands from a smelting-house, or *aqua fortis* works, the vapours of which injure the grass, corn or cattle.

The King v. White. 333

3 *Burr.*

149. Action on the case by a master against the seducer of his articed servant, bound under a penalty to serve him 5 years, which penalty the master had recovered in an action of debt against the servant, *before* he commenced this action against the seducer, but the debt and costs so recovered were not actually paid to him till after the commencement, though before the trial of it, the master cannot proceed in an action against any other person, after having received from the servant an ample satisfaction for the injury done him. Does not lie after compensation.

Bird v. Randall. 1345

150. Upon

Toties quoties
for partial
breaches.

3 Burr.

150. Upon articles with a penalty, the party injured may proceed *toties quoties*, for *partial* damages, for *partial* breaches, but he cannot repeat the rigorous remedy of proceeding for the penalty, because the penalty extends to all that he can be entitled to, for every breach, and puts a total end to the contract between the parties.

Bird v. Randall. Page 1352

Joint trespass,
joint contract,
actions *stricti*
juris, and case,
equitable bar,
justice and con-
science.

151. There is no analogy between cases of joint trespasses, and joint contracts, and the present case, and there is an essential difference between actions *stricti juris*, and actions upon the case; the latter are in the nature of bills in equity, and whatever will in equity bar the plaintiff's recovery, may in this action be given in evidence, because the plaintiff must recover upon the justice and conscience of his case, and upon that only. *Ib.* 1353

Maliciously
suing commis-
sion of bank-
ruptcy.

152. Upon the case lies for *maliciously* suing out a commission of bankruptcy.

Brown v. Chapman. 1418, 1419

Case, trespass.

153. Where the action is only consequentially injurious, case is the proper remedy, and not trespass; where an immediate injury is done to the plaintiff's possession, trespass is the remedy.

Harker v. Birkbeck. 1556

154. Action on the case for not taking away tithes, lies for not fetching away tithes within a reasonable time, but sometimes notice is required by custom.

Butter v. Heathby. 1891

(Vide 1 Str. 245. *Louth v. Jones.*)

4 Burr.

155. He in reversion, as well as he in possession, may maintain an action for a nuisance, by obstructing the lights, for it is an injury to the inheritance, as well as to the present enjoyment.

Jaffer v. Gifford. 2141

Cowper.

Judge of re-
cord.

156. If an action be brought against a *judge of record*, for an act done in his judicial capacity, he may plead that he did it as a judge of record, and *that* will be a sufficient justification; and so may a judge of a court in a foreign country, under the dominion of the crown.

Moslyn v. Fabrigas. 172

157. All

Cowper.

157. All actions of transitory nature that arise abroad, may be laid as happening in an *English* county.

Transitory
actions.

Mostyn v. Fabrigas. Page 177

Douglas.

158. Action on the case grounded on a custom, that all the inhabitants of a manor shall grind all the corn, grain and malt, which by them, or any of them, shall be used or spent, ground within the manor, at a certain mill, the custom held good.

On custom,
mills.

Cort v. Birkbeck. 208

Cowper.

159. An action does not lie against an auctionier, for selling a horse at the highest price bid for him, contrary to the owner's express directions not to let him go under a larger sum named; *scilicet* if the owner had directed the auctionier to set the horse up at such a particular price, and not lower.

Auctionier,
particular price.

Bexwell v. Christie. 395

160. The day is not material, provided the injury be proved to have been committed before the bill filed.

Foster v. Bonner. 454

161. Where an action is brought in consequence of a right liquidated by means of a statute, the statute is the only ground of action.

Right liqui-
dated, stat.

Rann v. Green. 476

162. An action on the case is the proper remedy for a fraud upon the toll of a market.

Fraud on toll.

Blakey v. Dinsdale. 664

163. Does not lie against the postmaster-general, for the value of a bank note stolen by one of the sorters of the post office, out of a letter delivered into the office.

Post-master.

Whitfeld v. Lord le Despenser. 754

Douglas.

164. An action on the case will lie for suppressing material facts in a return to a *mandamus*.

Return to
mandamus.

The King v. Lime Regis. 153, 154

165. And if the return is false in substance, though it be true in words.

Return false.

154

VOL. I.

Q

166. In

Custom, ancient mill.

Douglas.

166. In a declaration in case for a breach of a custom for inhabitants to grind at the plaintiff's mill, it is not necessary to state that the inhabitants had and ought, from time whereof, &c. nor that the mill is an ancient mill.

Curt v. Birkbeck. Page 208

Case differs from other action.

167. *Per Lord Mansfield.*—This is an action on the case in which the plaintiff states precisely and specially his ground of action, it is not like an ejectment, or an action for money had and received, where conclusions only are stated in the declaration, and the premises appear in evidence, every thing to be proved is set forth; if the facts are not sufficient to entitle the plaintiff to recover, that might be disputed *in limine* by demurrer. *Ib.*

Arrest by officer without warrant.

168. An action will not lie against a peace officer for arresting a person *bona fide* on a charge of felony, without a warrant, although it turn out that no felony was committed.

Samuel v. Payne. 345

Captured ship.

169. Nor against the captor for imprisonment, in consequence of a capture as prize, although the captured ship has been acquitted.

Le Caux v. Eden. 572, to 591

Goods, prize.

170. Nor for goods taken on shore as prize, by the joint operation of the fleet and army. *Ib.* 591, to 597

Arrest, privileged persons.

171. Nor against a sheriff or his officer, for having arrested a certificated bankrupt, a discharged insolvent debtor, a peer, a party to a cause, or witness. *Euendo vel redundo.*

Tarlton v. Fisher. 646, to 652

Trespass, case, intention.

172. *Per Lord Mansfield.*—There is a distinction between trespass *vi et armis*, and trespass on the case, which ought always to be attended to; in trespass, innocence of intention is no excuse; in case, the whole turns upon it; malice, or the *quo animo* is the very gist of the action. *Ib.*
(See Arrest.)

1 *Durnford and East.*

Possession of pew, prescription.

173. Possession alone for above 60 years of a pew in a church, is not a sufficient title to maintain an action upon.

on the case, even against a wrong doer, for disturbance in the enjoyment of it, but the plaintiff must prove a prescriptive right, or a faculty, and should claim it in his declaration as appurtenant to a messuage in the parish.

Stocks v. Booth. Page 428.

174. *Per Buller J.*—The word possession must always be understood *secundum subjectam materiam*; the possession of the church is in the parson, plaintiff therefore not having the exclusive possession, cannot maintain trespass, and in an action on the case, the plaintiff must prove a right either by prescription, or by faculty. *Ib.*
(Vide Prescription.)

175. Action on the case lies for maliciously obtaining or executing a warrant to search a house for smuggled goods, where none such are found. Malicious execution of warrant, smuggled goods.
Cooper and another v. Boot in error. (cited) 535

176. Action on the case lies against a governor, for maliciously suspending defendant from a civil office. Suspending civil officer.
Sutherland v. Murray. (cited) 538

177. An action on the case lies for infringing the plaintiff's patent, a patent is void, if the specification be ambiguous, or if it gives directions which tends to mislead the public. Infringing patent.
Turner v. Winter. 602

178. (Vide *Salk.* 447. *Edgeberry v. Stephens.* *Buller N. P.* 76, 79.)

2 *Durnford and East.*

179. Under a count for a voluntary escape, the plaintiff may give a negligent one in evidence. *Bonafous v. Walker.* 126

(Vide *Alexander v. Macauley.* 5. *D. & E.* 611.) 2 *Salk.* 90. 1 *Lord Raymond* 190.

180. Action for escapes being founded in *mal eficio* are not within the statute of limitations. 2 *Lev.* 191. *Jones v. Pope.*

181. Where a justice of the peace maliciously grants a warrant against another, without any information, upon a supposed Justice, malice in granting warrant.
Q 2

supposed charge of felony, the remedy against the justice is trespass for the false imprisonment, and not case.

Morgan v. Hughes. Page 225

3 *Durnford and East.*

Case, trespass.

182. The distinction between case and trespass is this, where the immediate act of imprisonment proceeds from the defendant, the action can only be trespass; but where the act of imprisonment by one person, is in consequence of information from another, there an action on the case is the proper remedy. *Ib.*

Public injury.

183. An action on the case will not lie by an individual, against the inhabitants of a county, for an injury sustained in consequence of a county bridge.

Ruffel v. the Men of Devons. 667

Warranty of horse.

184. If the purchaser of a horse warranted to be of a certain age, discover that he is of a greater age, and offer him to the seller, who refuses to take him back, he may sell the horse to any third person, and then maintain an action against the seller on the warranty.

Buchanan v. Parnshaw. 745

(*V. Stuart v. Wilkins, Douglaji* 18.)

3 *Durnford and East.*

Wager.

185. A wager that A. had purchased a waggon of B. is not void at common law, nor prohibited by stat. 14 G. 3. c. 48. which relates only to written instruments of insurance, and an action may be maintained upon it.

Good v. Elliott. 693

Goods not delivered,
contract, consideration.

186. A. having proposed to sell goods to B. gave him a certain time at his request to determine whether he would buy them or not. B. *within the time*, determined to buy them, and gave notice thereof to A. yet A. was not liable in an action for not delivering them, for B. not being bound by the original contract, there was no consideration to bind A.

Cook v. Oxley. 653

Deceit.

187. A false affirmation made by the defendant, with intent to defraud the plaintiff, whereby the plaintiff receives damage, by selling and delivering certain wares and merchandize upon trust and credit to a third person by the defendant's

defendant's persuasion, is the ground of an action upon the case, in the nature of deceit.

Pasley v. Freeman. H. 29 Geo. 3. Page 51

188. In such an action it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is.

Not necessary plaintiff should be benefited by deceit.
Ib.

4 *Durnford and East.*

189. Proof that the defendant's boat run down the plaintiff's, in the half-way reach in the *Thames*, will support an allegation that the boat was run down in the *Thames*, near the half-way reach, in an action on the case for negligence.

Negligence, misfeasance, transitory.

Drewry v. Twiss. 558

190. *Per Buller J.*—This is an action on the case for misfeasance, which is transitory in its nature; this is not like the case of contracts, where a trifling variation is fatal, because it does not appear that the contract given in evidence is that on which the plaintiff declares, nor like the case of a justification to an action, for it frequently happens that the justification as in false imprisonment, may be local, the officer having power only within certain limits.

Misfeasance, transitory.

191. When a plaintiff in possession brings an action on the case against a wrong doer, it is sufficient to declare generally on his possession, without disclosing any title, but when a defendant justifies under a right, a legal title must be set out formally in the plea.

Declaration, plea, prescription, profit in alien's, sole.

Grimstead v. Marlowe. 718

Trin. 32 Geo. 3.

192. There may be a custom for an easement as a right of way in *alieno solo*, but for a profit, *a prendre*, the party must prescribe in a *que estates*.

Que estate.

Ib.

193. An action on the case for not repairing fences, must be brought against the occupier of the land, and will not lie against the owner of the inheritance, who is not himself in possession; this is a possessory action on the case against a wrong doer, the landlord cannot be deemed a wrong doer, for the neglect of his tenant to repair, who is the occupier.

Cheetham v. Hampster. 318

194. If there be an exclusive ferry from A. to B. it does not prevent persons from going by any other boat from A. direct to C. though it lie near to B. provided it be not done fraudulently,

Exclusive ferry.

fraudulently, and as a pretence for avoiding the regular ferry.

Tripp v. Frank. Page 666

Henry Blackstone.

Bailment
without reward.

195. A. a general merchant, undertakes voluntarily, and without reward, to enter a parcel of goods of B. together with a parcel of his own of the same sort, at the custom-house, for exportation, but makes the entry under a wrong denomination, whereby both parcels are seized, A. having taken the same care of the goods of B. as of his own, not having received any reward, and not being of a profession or employment which necessarily implied skill in what he had undertaken, is not liable to an action for the loss occasioned to B.

Shiells and another v. Blackburne. 158

196. (Vide doctrine of bailment. *Coggs v. Bernard.* 2 Lord *Raymond*, 909.)

197. *Per Lord Loughborough.*—If in this case a ship broker, or a clerk in the custom-house, had undertaken to enter the goods, a wrong entry in them would be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries. *Ib.*

198. Case lies for removing a wooden stable, after stay of execution on an ejectment. 258

2 *Henry Blackstone.*

Id.

199. *Per Ashburnst, J.*—The distinction is this, if a party undertake to perform work, and proceed on the employment, he makes himself liable for any misfeasance in the course of that work; but if he undertake, and do not proceed on the work, no action will lie against him for the nonfeasance; the defendant's undertaking here, was merely voluntary, no consideration for it being stated, there was no custom of the realm, or any legal obligation, to compel him to perform this work, and this distinguishes the case from that of a common carrier, &c. *Ib.*

Insufficient
sureties, replevin,
bond.

200. In an action on the case against a sheriff, for taking insufficient sureties in a replevin bond, the plaintiff may recover damages beyond the penalty of the bond, i. e. for more than double the value of the goods distrained.

Concanen v. Lethbridge. 36

201. To

Esplanasse's Cafe at N. P.

201. To an action on the cafe for unskilfully doing any work, it is no defence that the defendant in the action recovered in a former action for work and labour, which work and labour was that for the unskilfulness of which, the action is thus brought. Unskilful work.

Sintzenick v. Lucas. Page 43

202. Cafe will lie where a party undertakes to get a policy done for another, without any consideration, if the party so undertaking it takes any steps for that purpose, but does it so negligently, that the person has no benefit from it. Negligence no consideration.

Wilkinson v. Coverdale. 75

Common.

Common.

2 Lord *Raymond*.

1. **A** Man may prescribe for common appurtenant to his cottage for cattle, *levant* and *couchant* there.

Emerton v. Selby. Page 1015

2. A commoner cannot give his title in evidence upon not guilty, as the lord of the soil may.

Mayor of Winton v. Wilks. 1134

3. Custom for the reeve to drive a common whensoever he is commanded by the steward, reasonable.

Follet v. Troake. 1187

4. Customary freeholders may have common by prescription, and there may be a drift of the common by custom.

Ib. 1188

2 *Wils.*

5. There is no such thing as common without stint, as belonging to land, it can only be for cattle *levant* and *couchant* thereon.

How v. Strode. 274

3 *Wils.*

6. The doctrine of rights of common and much learning on that subject.—279, 280, 281, &c.

Atkinson v. Teasdale.

7. Disturbance of right of common, and of right to cut and take rushes there, may well be put in one single count.

Beau v. Bloom. 458

8. If a man who has a right of common upon the lord's waste, for cattle *levant* and *couchant* on, his land, surcharge the common, the lord cannot for that cause distrain, for the lord cannot judge thereof.

Anonymous. 126

1 *Blackstone.*

9. If a common be absolutely stinted in point of number, one commoner may distrain the supernumerary cattle of

of another; but not if an admeasurement is necessary, as where the stint has a relation to the commoner's land.

Hall v. Harding. E. 9 Geo. 3. Page 673

2 Blackstone.

10. In an action on the case for a surcharge of common, the plaintiff may declare generally for the injury, without stating precisely what the defendant's true right of common is.

Atkinson v. Teasdale. E. 12 Geo. 3. 817

11. Occupier of a messuage and lands who has common thereby, on the lord's waste, may set up a custom to cut rushes, as annexed to his right of common.

Bean v. Bloom. M. 14 Geo. 3. 926

12. In case for a surcharge of common, the plaintiff need not shew that he turned on any cattle of his own, at the time of the surcharge, but only that he could not have enjoyed his common as beneficially as he ought.

Wells v. Watling. M. 19 Geo. 3. 1233

1 Burr.

13. Is only a right of eating the grass in a certain place, by the mouth of the commoner's cattle: but the lord remains owner of the soil, and may enjoy it consistently with his grant, but not contrary to it.

Cooper v. Marshall. 265, 268

14. Indeed where the lord acts contrary to his grant, as by inclosing and erecting obstructions to keep the commoners out, and not leaving sufficient, the commoner may pull down the hedges or erections. *Id.*

15. But where there is only a surcharge by the lord, a mere excess of his right, the commoner is not to be his own judge, and to treat it as a nuisance abatable. *Id.*

4 Burr.

16. For an over charge, the commoner had antiently two remedies, viz. an assize of surcharge by the lord, a writ of admeasurement, if surcharged by a fellow commoner; an action on the case also may be maintained against either, but he cannot distrain wherever there is colour of right, though he may distrain the cattle of a stranger, or even of the lord; if he be totally excluded by a custom, he cannot distrain a fellow commoner's cattle as surcharged, where the number allowed depends upon the number of acres,

acres, or requires a medium to determine the proper proportion, or depends upon a collateral fact, or upon matter of judgment.

Hall v. Harding. Page 2426, to 2432

17. Yet *quere*, whether a commoner has not a right to distrain the surplus cattle of a fellow commoner, who is stinted to a number absolutely certain, and exceeds such absolutely ascertained number.—2431, but where the right of common is for cattle *levant* and *couchant*, one commoner cannot distrain the cattle of another for a supposed overcharge. *Ib.*

4 *Durnford and East.*

18. One commoner who has surcharged, may nevertheless maintain an action against another, for surcharging the common.

Hobson v. Todd. *Mich.* 31 *Geo.* 3. 71

Condition.

Condition.

Salkeld.

1. **A** Condition made impossible by the act of God, can't be broken. Impossible by act of God.

Thomas v. Howell. Page 170

2. See the nature and effect of a condition precedent. Precedent.

Thorpe v. Thorpe. 171, 231

3. An agreement that A. shall do, and for the doing, B. shall pay the latter, is a condition precedent. Id.

4. But where a time is fixed for the payment, it will vary the construction. Id.

Callonel v. Briggs. 113, vide 171

5. A release of all demands will not release a promise unbroken, or a future act. Release.

Thorpe v. Thorpe. 171

6. A condition is to be construed as an agreement, according to the intent of the parties. Agreement.

113, 171, 172

7. Where a condition is underwritten, or indorsed, if it be void, the obligation remains single. Part of the lien, or underwritten obligation single.

8. But if the condition is part of the lien itself, and incorporated with it, there if the condition be impossible, the obligation is void.

Pullerton v. Agnew. 172

9. Condition to exhibit inventory into the spiritual court before such a day, the defendant in excuse must not only plead, Remedy to perform.

10. That no court was held, but also that he was there ready.

Archbishop of Canterbury v. Willis. 251

11. Where a condition is precedent to the taking of an estate, non-performance differs from a forfeiture thereof in equity. Non-performance, forfeiture.

Bertie v. Falkland. 231, 232

12. Condition

- Salkeld.**
- Request.** 12. Condition to do an act at the end of seven years or request, request must be made on the last day.
Bertie v. Falkland. Page 231, 232
- 1 Lord *Raymond*.
- Of bond, omits conclusion.** 13. Condition of a bond omitting the conclusion, that then the bond shall be void;—the condition to pay is a good defeasance, and if the money be paid, the bond is void.
Avery v. White. 38
- To convey land.** 14. Condition to convey lands is broken by devising the lands to an infant, otherwise of a descent.
Hulbert v. Watts. 112
- Disjunctive covenant, one part impossible.** 15. To make a lease to A. before such a day, or pay 100*l.* A. dies before day, the money must be paid.
Studholme v. Mandell. 279
- Performance.** 16. Conditions performed, where to be pleaded specially.
Levinz v. Randolph. 597
- Precedent.** 17. Where *in consideratione cujus* makes a condition precedent.
Thorpe v. Thorpe. 665
18. If a man will make such an agreement as to pay his money before he has the thing, for which he ought to pay it, and will rely upon his remedy to recover the thing, he ought to perform his agreement. *Ib.*
- 2 Lord *Raymond*.
- Precedent.** 19. *Ita quod* when it will make a condition precedent.
Feltham v. Cudworth. 766
20. *Per Holt*.—Though *ita quod* is held in *Littleton* to make a condition subsequent, yet that is in case of estates executed, but it is otherwise in case of things executory. *Ib.*
- Request.** 21. Condition to make an apprentice free, at the end of seven years, if it shall be desired, it is a good plea that he was not requested, after the expiration of the seven years.
Fitzbugh v. Dennington. 1095
- Performance.** 22. Performance ought to be pleaded in the words of the condition, otherwise of matter of excuse.
Fanshawe v. Morrison. 1140
23. Where

2 Lord Raymond.

23. Where the condition of a bond may be good in part, and void in part.

Good in part.

Johnson v. Laferre. Page 1459

24. If breach be assigned upon part of the condition which is good in law, though the other part should be against law, that will not hinder the plaintiff's recovering upon the part of the condition which is legal.

Id.

Id.

Strange.

25. Distinctions between conditions precedent, and concurrent acts.

Precedent concurrent.

Merrit v. Rane. 459

26. A. is to transfer stock, and B. to pay for it, the transfer is not a condition precedent.

Precedent.

Blackwell v. Nash. 535

27. For makes a condition precedent in a covenant, to pay money for stock at a day certain.

Precedent.

Lock v. Wright. 569

28. Where a plea is general *quod in demnem conseruavit*, it must be shewn for cause that it does not say how.

Preserve harmless.

White v. Cleaver. 681

29. An entry by a stranger without authority, is good, to take advantage of a condition, if it be assented to afterwards.

Entry by stranger.

Fitchet v. Adams. 1128

30. Devise to A. for life remainder to B. in fee, with condition, that if C. in three months pays B. five hundred pounds, then C. to have the fee, the condition will descend to the heir of C.

Descending to heir.

Marks v. Marks. 129

Hardwicke.

31. Where there are negative and affirmative conditions, the plaintiff must shew, not only that he has not broke the negative ones, but also that he has performed the affirmative ones.

Negative, affirmative.

Fletcher v. Richardson. 307

2 Wilson.

32. Conditions of bonds are to be construed liberally, in favor of obligors.

Of bonds.

Box v. Day. 61

33. A

2 *Wilson*.

33. A bond to a lady, with a condition to pay her an annuity, in consideration of part cohabitation, is good in law, conscience, and honor.

Turner v. Vaughan. Page 339. V. 2.

3 *Wilson*.

To re-enter
during term.

34. A proviso in a lease to re-enter for a condition broken, can only operate during the term, and vanisheth when that ends.

Johns v. Whitley. 140

Douglafs.

Precedent.

35. Instance where the vesting of a prior limitation, is not a condition precedent in a will.

Bradford v. Foley. 63, to 66

Precedent.

36. Instance where it is.

Doe v. Shippard. 74, to 79

Performance.

37. Where the performance of one covenant, is a condition precedent to another.

Jones v. Barkley. 665

Precedent.

38. Instances of conditions precedent in policies of insurance, vide insurance.

1 *Durnford and East.*

Precedent
subsequent,
no precise
words.

39. No precise technical words are required in a deed, to make a stipulation a condition precedent, or subsequent, neither does it depend upon its being prior, or posterior in the deed, but it must depend on the nature of the contract, and the acts to be performed by the contracting parties.

Hotham v. the East India Company. 645

Id.

40. A covenant in a charter party, "that no claim should be admitted, or allowance made for short tonnage, unless such short tonnage be found and made to appear on her arrival on a survey, to be taken by four ship-wrights, to be indifferently chosen by both parties," is not a condition precedent to the sheriff's rights of recovering for short tonnage, but is a matter of defence to be taken advantage of by the defendant, and though not averring performance, is no ground for arresting the judgment.

Ib.

41. If

1 *Durnford and East.*

41. If the defendants prevent the performance of a condition precedent by their neglect and default, it is equal to performance by the plaintiffs. Performance prevented.

Hotham v. the East India Company. Page 645

3 *Durnford and East.*

42. Grand children deemed to be issue of the marriage, within the meaning of the condition of bond. Issue, grand children.

Haydon v. Wilshire. 372

43. (Words in a covenant, promise, or agreement, that do not import a condition, are never to be construed conditional, unless such an implication were absolutely necessary, and the party would be otherwise without remedy.—*Gib. E. 198.*) Condition, necessary implication of.

Contract.

Definition and
nature of.

1. **A** Contract which usually conveys an interest merely in action is thus defined, an agreement upon sufficient consideration to do, or not to do a particular thing—there are three points to be contemplated in all contracts. First, the agreement. Second, the consideration, and third, the thing to be done or omitted, or the different species of contracts—as to the first, it is an agreement, a mutual bargain or convention; and therefore there must at least be two contracting parties of sufficient ability to make a contract—it may be either express where the terms of the agreement are openly uttered and avowed at the time of the making, or implied, such as reason and justice dictate, and which therefore the law presumes, every man undertakes to perform; the consideration may be either good, as that of blood, or natural affection, or valuable, as for marriage, for money for work done, &c. As to the third, the thing agreed to be done or omitted, the most usual contracts, whereby the right of chattles personal may be acquired, are, 1. that of sale or exchange; 2. of bail; 3. of hiring or borrowing; 4. of debt.

2 *Black. Com.*

Page 442

2. A contract is a transaction, in which each party comes under an obligation to the other, and each reciprocally acquire a right to what is promised by the other.

Powell on Contracts. 6

3. All conditions repugnant to the nature of the contract are void—as a feoffment in fee, on condition that the feoffee shall not alien.

Ib. 261

4. A contract is said to be executed, when two or more persons make over their right to each other, without either party trusting to the other.

Ib. 235

5. An agreement is the consent of two or more persons concurring, the one in particular with the other in receiving
some

some property, right or benefit—though a contract, executed with all the solemnity required by law, may properly be called an agreement. Yet, in the more common acceptation of the word, articles, minutes, an *escron*, &c. containing something preparatory to a more solemn and formal execution, are called agreements.

1 *Bac. Ab.* Page 67

Holt.

6. In executory agreements, the doing of the act is a condition precedent to the payment; but if a day be appointed for payment before the thing can be performed, then an action lies for the money before thing be done, otherwise if subsequent.

Executing condition precedent.

Thorpe v. Thorpe. 96

7. Earnest only binds the bargain, that the vendor cannot sell the goods to another without default in the vendee, who ought upon demand of the goods to tender the money—if vendee does not take away the goods, upon request of the vendor within a reasonable time, the agreement is dissolved.

Earnest, effect of.

Langford v. Tyler. 97

8. 'Tis a deceit for a man, who not being the owner, has possession of goods to sell them as his own.

Possession, property.

Medina v. Stoughton. 208

9. A man affirming goods to be his own on a sale, amounts to a warranty.

Property. *Ib.* warranty.

Salkeld.

10. Where A. by contract subjects himself to one action only, it can't be divided, so far as to subject him to two.

Entire contract, not divisible.

Counts of *Plymouth v. Throgmorton.* 65

11. *Ergo.* Indorsee of part of a sum in a bill of exchange, can't have action for that part *sans* shewing the other part to be satisfied.

Id.

Hawkins v. Cardee. 65

12. So where the contract is at first entire, it cannot afterwards be divided in an action.

Id.

Ib.

Salkeld.

Id. 13. As where the contract is to pay one hundred pounds *per annum*, for his service; action lies not for three quarters.

Countess of *Plymouth v. Throgmorton.* Page 65

Id. 14. So, of a lease for years at 2*ol.* *per annum*, it lies not for any less term than a year. *Ib.*

Id. 15. And so of other contracts for annuities, wages, debts, &c. the contract can't be apportioned. *Ib.*

Id. 16. But if in a lease the *habendum* be for years, yet the rent may be apportioned according to the *reddendum*.

Tomkins v. Pincent. 141

17. *Per Cur.*—For where special days of payment are limited by the *reddendum*, the rent must be computed according to the *reddendum*, and not according to the *habendum*, and the computation of the rent, according to the *habendum* is only where the *reddendum* is general: *secus* yielding and paying quarterly so much rent. *Ib.*

18. *Assumpsit* to deliver corn on or before the fifth of *January* into a barge, to be brought by the plaintiff, breach that he did not deliver on the fifth of *January* is good—the defendant could not make a tender to oblige the plaintiff to accept before the last day, and therefore since the last day is the time appointed, when the one is obliged to deliver, and the other to accept it, shall not be presumed that the plaintiff was there before the time ready to accept the corn with his barge.

Harmon v. Ouden. 140

Lodger, guest. 19. Note. A lodger is upon express contract a guest, but if a guest steal 'tis felony, if a lodger not.

Parkhurst v. Foster. 388

Guest. 20. One by leaving his horse in an inn becomes a guest, *secus* of a dead thing. *Ib.*

Earnest, effect of. 21. Earnest only binds the bargain, and gives the buyer a right to demand the goods.

Langfort v. Administratrix of Tiler. 113

Salkeld.

22. But notwithstanding earnest, the money is to be paid on fetching away the goods, and a demand without payment is void. Id.

Langfort v. Administratrix of Tiler. Page 113

23. And if the buyer does not come to pay the seller, ought to go and request him, and then if he does not pay, &c. in convenient time, the agreement is dissolved. Id.
Ib.

24. Where one thing is to be as the condition of the other, though there be mutual promises, performance must be averred. Mutual promises.

Callonel v. Briggs. 112

25. As if I sell you my horse, upon your paying me ten pounds, I can't have the money without averring payment, or tender and refusal of the money. Id.
Ib. 113

26. So where mutual promises are to transfer stock on payment of so much money. Id.
112

27. But *aliter* where a time is limited for the performance on one part. Time for performance,
113, 171, 172

28. If A. and B. come to a shop, and A. says to the seller let B. have such and such goods, and I will see you paid, &c. the law intends A. to be the buyer, and B. to act but as A.'s servant. Collateral undertaking.

Butcher v. Andrews. 23

1 Lord *Raymond.*

29. *Affump't* to deliver good merchantable wheat, evidence of a contract to deliver good. Second sort of wheat is a variance. Variance.

Anonymous. 735

Strange.

30. Defendant bespoke a chariot, and when it was made, refused to take it, and in an action for the value it was objected, that they should prove something given in earnest, or a note in writing, since there was no delivery of any part of the goods, but the chief justice ruled this not to be a case within the statute of frauds, which relates only to contracts for the actual sale of goods, where the buyer is immediately answerable without time given him by special agreement, Statute, fraud, contract executed.

agreement, and the seller is to deliver the goods immediately.

Towers v. Sir J. Osborne. Page 506

Hardwicke.

Damages.

31. The damage laid in the declaration, are considered as the cause of action.

Horton v. Kilmore. 5

Entire contract proved, otherwise on tort.

32. In an action on a contract, the whole contract must be proved, and all the charges in the declaration, exactly in the manner they are laid or the plaintiff non-suited, but in an action for a *tort* it is otherwise, for the issues being several, if any one charge is proved, it is sufficient, as they are separate wrongs.

Smith v. Hickson. 49

3 *Wijn.*

33. The factor who made the agreement was admitted as a witness to prove the delivery of the goods, though he was to have a shilling in the pound—he is a mere go-between, and has no more interest for the buyer than the seller.

Dixon v. Cooper. 40

1 *Blackstone.*

Place of making.

34. The place of making a contract, is to be considered in expounding it, and not where the action is brought, unless the parties have a view to another kingdom, at the time of making the contract.

Robinson v. Bland. 258

Articles, penalty.

35 Where there are articles of agreement, guarded with a penalty, the party may either pursue his remedy *toties quoties*, the articles are broken by case or covenant, or he may proceed to recover the penalty, but when he takes the penalty, he discharges the other party from all future obligation, and can never recover any thing more under the articles.

Bird v. Randall. 388

(See 3 *Burr.* 1345.)

2 *Blackstone.*

Purchaser, loss of bargain.

36. Contractor for a purchase of a real estate, to which the title proves (without collusion) defective, is entitled to

no satisfaction for the loss of his bargain.—Defendant had paid the deposit and interest into court.

Flureau v. Thornhill. Page 1078

3 *Burrow.*

37. An auctioneer is an agent for the buyer as well as the seller; after knocking down the hammer, and his setting down in writing the name of the buyer, the price, &c. was sufficient to take it out of the statute of frauds; the buyer's coming the next day, and seeing the goods weighed, is an additional circumstance, though no earnest was paid—the court inclined to think that buying and selling at auctions was not within the statute of frauds—the defendant in this case failed to take away the goods, they were set up again, and he was held liable for the difference of price.

Simon v. Motivos. 1921

4 *Burr.*

38. *Per Lord Mansfield.*—The statute of frauds relates only to contracts for the actual sale of goods, where the buyer is immediately answerable without time given him by special agreement, and the seller is to deliver the goods immediately. *Per Yates J.* that clause of the stat. only relates to executed contracts, here wheat was sold, to be delivered at a future time, it was unthreshed at the time when the contract was made, therefore it could not be delivered at that time.

Statute of frauds,

contract executed.

Clayton v. Andrews. 2101

(See 1 *Str.* 506. *Hen. Bl.* 20.)

5 *Burr.*

39. Defendant was an auctioneer, and in that character had sold to the plaintiff an interest in land, for which the plaintiff had paid him a deposit of fifty pounds, but upon an objection to the title, and the want of disclosure of certain circumstances, which ought to have been disclosed at the time of bidding, the plaintiff (the purchaser) declined going on with the contract.—Verdict for plaintiff for fifty pounds.

Burrough v. Skinner. 2639

40. It is immaterial whether the auctioneer has paid over the money to his principal or not, for he is a stake holder, and ought not to part with the deposit, till the sale is completed.

Ib.

41. (*v. Hen.*

5 Burr.

41. (v. Hen. Bl. 81, 289.—3 Burr. 1921.—3 D. & E. 148. Cowp. 395). The depofite is to be allowed as part of the price on payment for the goods.

Cowper.

Contrary to
moral policy.

42. A contract, though not prohibited by positive law, nor adjudged illegal by precedent, may nevertheless be void, if against principles of morality, or sound policy. *Jones v. Randal* 39.

This was an action of *assumpsit*, to recover money won upon a wager, whether a decree of the court of chancery would be reversed or not, on appeal to the house of lords—and held that such action lies, unless the motive be fraud or other *turpis causa*. *Ib.*

In pari delicto.

43. There are two sorts of prohibitions in respect of contracts. 1st, To protect weak or necessitous men from being over-reached, and here the rule *in pari delicto potior est conditio defendentis* does not hold, because, where the defendant imposes on the plaintiff, it is not *par delictum*. Secondly, prohibitions founded upon reasons of publick policy, there both parties offending are equally guilty, and the above rule does hold.

Clark v. Shee et al. 200

Ex malificio non oritur contractus.

Vendor, de-
livery.

44. If a vendor actually takes upon himself to deliver the goods to the vendee, he stands to all risks, but if the vendee order a particular mode of conveyance, the vender is excused, and the vendee must stand to any loss that may happen.

Vale v. Bayle. 294

Vendee, de-
livery.

45. Thus when the vendee wrote in these words, "I beg you will send them by land carriage, as they are detained a long time at *Bristol* before they arrive," the vendor delivered them to the book-keeper of the *Birmingham* carrier, which was the only mode of sending them by land-carriage, and the goods were lost, adjudged that this was a good delivery to the vendee. *Ib.*

Goods in
transitu.

46. But while the goods are *in transitu* before actual possession by the vendee, the vendor hath such a lien upon them, as to be permitted to get them back, if the vendee in the mean time has become a bankrupt. *Ibid.* Vide also *Birkett v. Jenkins.* *East.* 11 Geo. 3. cited. *Ib.* 295

47. If

Cowper.

47. If vendor sell goods by sample, to be delivered to the vendee within a month, and take earnest, and within a month send them by his servant to the premises, where part being unloaded, the rest are distrained for toll, the delivery is complete, so as to entitle the vendee to bring trespass for the seizure. Earnest delivery.

Blakely v. Dinsdale. Page 664

48. So it was to all honest purposes, in respect of third persons, the moment the vendor hath delivered the goods to his own servant to carry to the vendee. Id.

49. Action lies for goods sold abroad, which are prohibited here, if the delivery of them be compleat abroad, though the vendor may know they are to be run into *England*. Sold abroad,

Holman and others, v. Johnson. 341

50. The plaintiffs in this case, who were merchants, living at *Dunkirk*, sold tea to the defendant there, which they delivered at *Dunkirk*; though this tea was for the purpose of being smuggled into *England*, and that known to the plaintiffs at the time, yet they not being concerned in the smuggling, and it being a fair sale as to them, and good by the laws of the country, where they lived, they were allowed to recover the price of the tea in *England*. Delivery abroad.

51. *Secus*, if the vendor was to deliver the goods in *England*, or if they were only to be paid for, in case the vendee should succeed in landing them. Id.
Ib. 344, 345
(*v. 4 D. & E. 466.—3 D. & E. 341.*)

52. Action does not lie against an auctioneer, for selling a horse at the highest price bid for him, contrary to the owner's express directions, not to let him go under a larger sum named, otherwise, if the owner had directed the auctioneer to set the horse up at such a particular price and not lower. Auction.

Bexwell v. Christie. 395

Dougl.

53. An agreement to accept a bill of exchange, may amount to an acceptance. Agreement to accept bill.

Mason v. Hunt. 285, 286

54. Several owners of different ships, having entered into a bond to a trustee, binding themselves and their assigns to indemnify each other to a certain amount, if any of their ships should be lost, and one of them having sold his ship, Joint contract.
and

and she being afterwards lost, the others are not liable under the bond, unless the vendor has sold together with the ship, his interest in the agreement of indemnity.

Ayres v. Wilson. Page 370, 371

Douglas.

Id.

55. But if the vendor had agreed with the vendee, to pay him so much, if the ship should be lost in a given time, and the ship had been lost within that time, it should seem that the vendor might sue the others. *Ib.* 371. n.

With government.

56. Government having contracted to furnish forage for a certain number of horses, to be kept by a sutler, and the contractor for forage having agreed not to commute the forage for money, an agreement between the sutler and contractor for forage, that the latter should allow the former a sum of money for each ration of forage allowed for the whole number of horses, and shall retain the forage, is void.

Willis v. Baldwin. 433, 434.

Wages.

57. An officer or sailor, who has agreed to serve on board a letter of marque for certain wages, during the voyage, and a share of all prizes, is not entitled to any part of the wages if the ship is taken before she compleat her voyage, although he shall be sent from the ship before the capture as prize-master, on board a prize taken by her in the course of the voyage.

Abernethy v. Landale. 520, 524

Possessory title.

58. In an action on an agreement, to deliver possession of certain premises, subject to the forfeiture of a stipulated sum on failure of either party, the person who was to deliver possession cannot support an action for the forfeiture, although he aver, that he was ready and willing to deliver the possession, &c. without shewing in his declaration a possessory title in himself.

Luxton v. Robinson. 598, 599

One of two things prohibited.

59. Under an agreement to perform one of two things, the option is in the person who is to perform, if one of the two things is prohibited under a penalty, no action will lie for the penalty, until the party makes his election, by performing the the prohibited part of the contract.

Layton v. Pearce. 14

60. The

Douglas.

60. The agreement was, that the defendant would either deliver to A. B. an undrawn lottery ticket, or pay him twenty pounds. Id.

Layton v. Pearce. Page 14

61. If one covenant with another to do a certain act in consideration of a reward, and the other prevent the stipulated thing from being literally performed, and accept of an equivalent, he may be sued for the reward, and the reason of the non-compliance with the literal terms may be averred. Performance prevented.

Hotham v. East India Company. 259

62. If money be paid on an illegal contract, while the contract remains executory, the money may be recovered back in an action for money had and received. Executory contract rescinded.

Lowry v. Bourdieu. 452, 454, 455

63. An insurance being made without interest, and the premium paid, the insured shall not recover back the premium after the ship has arrived safe. Ib.

64. *Buller J.*—There is sound distinction between contracts executory and executed, if an action is brought, with a view to rescind a contract, you must do it while the contract continues executory, and then it can be only done on the terms of restoring the other to his original situation.

65. *Per Lord Mansfield.*—It must not be understood, that the court holds, that in all cases where money had been paid, on an alledged consideration, it cannot be recovered back; the meaning of the rule *in pari delicto potior est conditio defendentis*, is not, that the defendant's right is better than that of the plaintiff, but the plaintiff must draw his remedy from pure fountains. *In pari delicto.*

Ib.

66. In cases of oppression as an usurious contract, though the contract be compleat, the money may be recovered back, for the parties are not *in pari delicto*. Ib.

Ib.

67. A sum of money had been paid, in order to procure a place in the customs; the place had not been procured, and the party who had paid the money, having brought his action to recover it back, it was held that he should recover, because the contract remained executory. Executory.

Walker v. Chapman, (cited.) 454

68. Contracts

- Gaming, securities.** *Douglas.*
68. Contracts as well as securities for money won at play, are void.
Lowe v. Waller. Page 715
- Money lent, won.** 69. Securities, but not contracts for money lent to play with, are void. *Ib.*
- Mercantile.** 70. All mercantile contracts ought to have a liberal construction.
- Contract put an end to.** *1 Durnford and East.*
71. *Assumpsit* for money had and received, lies when a payment has been made on a contract, which is put an end to.
Towers v. Barrett. 133
- Id.** 72. This was an action for money had and received, to recover 10 guineas, which plaintiff had paid to the defendant for a one horse chaise and harness, on condition to be returned, in case the plaintiff's wife should not approve of it, paying 3s. 6d. *per diem* for the hire, the chaise not being approved of, it was returned, and the hire tendered and refused. *Ib.*
- Contract open.** 73. If the contract continue open, the plaintiff can only recover damages for the breach of it, and then he must state the special contract. *Ib.*
- Difference.** 74. The difference between those cases where the contract is open, and where it is not so is this, if the contract be rescinded, either as where, by the terms of it, it is left in the plaintiff's power to rescind it by any act, and he does it, or where the defendant afterwards assents to its being rescinded, the plaintiff is intitled to recover back his whole money, and then an action for money had and received will lie, but if the contract be open, the plaintiff's demand is not for the whole sum, but for damages arising out of it, and then he must state the special contract. *Ib.*
- Contract with government.** 75. An officer appointed by government treating as an agent for the publick, is not liable to be sued upon contracts made by him in that capacity.
Macbeath v. Haldimand. 172
- By deed.** 76. Nor even though he contract by deed, if it be on account of government.
Unwin v. Wolfely. 674

77. Where

Durnford and East.

77. Where goods are delivered under an agreement, to take a specific parcel of copper money in payment, a delivery of such copper will be a good bar to an action, for the value of the goods, though in fact it was counterfeit money. Illegal consideration.

Alexander v. Owen. Page 225

78. An illegal contract if rescinded as to part, must be rescinded as to the whole; therefore, if a plaintiff furnishes goods in consideration of counterfeit money be paid him, and he afterwards refuses to take it, he cannot recover in an action the value of the goods delivered. *Ib.* 226, 7 Illegal as to part.

79. Where goods are ordered for a ship by the owners, before the appointment of the captain, though some are not delivered till afterwards, yet as no personal credit is given to the captain, he is not answerable for any of them. Captain of ship.

Farmer v. Davies. 108

80. But where the captain contracts for the goods, though they are furnished for the use of the ship, he is answerable in respect of his contract. *Ib.* Contract by captain.

81. So that in such case the tradesman has a claim, both on the captain and owners, as well as a specific lien on the ship itself. *Ib.* Captain owner.

82. Before a party can entitle himself by a civil action to relief from an usurious contract, he must tender all the money really advanced. Usurious.

Fitzroy v. Gwillim. 153

83. When goods were pawned to a broker for a certain sum, and usurious interest agreed to be paid, therefore the pawner of the goods cannot maintain an action of *trover* for them, in order to get rid of the usurious contract, without first tendering the money, which had been actually advanced, and legal interest. *Ib.* Usurious.

84. In cases upon contracts, it is necessary to set out the contract entire.—*Per Buller Justice.* Truly set out, difference fatal.
(In the *King v. Pippett.*) 240

85. Where the contract declared upon was, that the defendant should deliver to the plaintiff, all his tallow at four shillings per stone, and the contract proved was, that the defendant Variance.

defendant should deliver it at 4s. per stone, and so much more as the plaintiff paid to any other person, this was held a fatal variance.

Churchill v. Wilkins. Page 447

1 *Durnford and East.*

86. *Per Buller, J.*—This is an action on a special agreement, the agreement is the gift of the action, and therefore it must be stated truly, the plaintiff need not set forth different parts of an agreement, which are not essential to the right of action—but here the contract proved is different from that alledged—when it depends upon the event of another fact, whether the contract is absolute or conditional, the plaintiff cannot state the contract as absolute.

Ib.

2 *Durnford and East.*

Venue.

87. In debt for goods sold and delivered the plaintiff, declared, that the defendant at *Westminster*, in the county of *Middlesex*, was indebted to him in a certain sum for goods sold and delivered without alledging an express contract, and place where such contract was made upon special demurrer, for these causes the court held the contract and venue well laid.

Emery v. Fell. 28

88. *Per Buller, J.*—The words sold and delivered, imply a contract, for there cannot be a sale unless two parties agree—as to the venue, if it were necessary to prove, that the contract was made at *Westminster*, it may be done under this description, but it is not necessary, for it may be proved any where, which shews, that the venue is merely added for form sake.

Ib.

Ambutory.

89. *Per Ashhurst, J.*—Where the delivery of goods is to be at a distant place, as between the vendor and vendee, the contract is ambutory till delivery, and therefore in case of the insolvency of the vendee, in the mean time the vendor may stop the goods *in transitu*, but as between the vendor and third persons, the delivery of bill of lading, is a delivery of the goods themselves, if not, it would enable the consignee to make the bill of lading an instrument of fraud.

Bill of lading.

Lickbarrow v. Mason. 72

*Transfer of
chattles, pos-
session.*

90. It is a general rule in the transfer of chattles, that the possession must accompany and follow the deed.

Edwards v. Harben. 587

91. Therefore,

1. *Durnford and East.*

91. Therefore, where the conveyance is absolute, the possession must be delivered immediately; where it is conditional, it will not be rendered void by the vendor's continuing in possession 'till the condition be performed.

Absolute,
conditional.

Edwards v. Harben. Page 587

92. An absolute conveyance of personality without possession, is in point of law fraudulent, and not merely evidence of fraud.

Conveyance
without possession void.

Ib.

3. *Durnford and East.*

93. A bidder at an auction under the usual conditions that the highest bidder shall be the purchaser, may retract his bidding at any time before the hammer is down.

Payne v. Cave. 148

(*v. 5 Burr. 2639.*)

94. The vendee at an auction may forfeit his deposit, and give up all claim to the thing intended to be purchased.

Saville v. Saville. 1 *P. Will.* 745

95. A broker, when he bought goods for his principal, agreed for half *per cent.* to indemnify him from any loss; on the re-sale - it was held, that this undertaking was discharged, when the principal had a fair opportunity of selling to advantage but neglected it, though he was afterwards obliged to sell at a loss.

Broker, principal, indemnity.

Curry v. Edensor. *H. 30 Geo. 3.* 524

96. If A. agree to give B. a certain sum for goods in advancement of C. any secret agreement between B. and C. that the latter shall pay a further sum is void as a fraud on A. although the bill of sale is made to A. and B. cannot recover such further sum against C.

Secret agreement.

Jackson v. Duchaire. *H. 30 Geo. 3.* 551

97. An action cannot be maintained by several partners for goods sold by one of them living in *Guernsey*, and packed by him in a particular manner, for the purpose of smuggling, though the other partners who resided in *England*, knew nothing of the sale, for it is a contract by subjects of this country made in contravention of the laws, and this case must be considered in the same light, as if all the partners resided in *England*.

Prohibited goods.

Biggs and others v. Lawrence. *M. 30 Geo. 3.* 454

98. *Per*

3 *Durnford and East.*

98. *Per Buller, J.*—This must be considered as if it were a contract made between the plaintiff and the defendant, and residing in this country, for the delivery of goods in *Guernsey* for the purpose of smuggling them into *England*.—The case of *Holman and Johnson*, went on the ground of the plaintiffs being foreigners, which distinguishes it from this.

Biggs and others v. Lawrence. M. 30 Geo. 3. Page 45
(*v. 4 D. & E. 466.—Cowp. 341.*)

Consideration.

99. A. having proposed to sell goods to B. gave him a certain time at his request to determine, whether he would buy them or not; B. within the time determined to buy them, and gave notice thereof to A. yet A. was not liable in an action for not delivering them; for B. not being bound by the original contract, there was no consideration to him.

Cooke v. Oxley. E. 30 Geo. 3. 65.

100. *Per Buller, J.*—In order to sustain a promise, there must be either a damage to the plaintiff, or an advantage to the defendant, but here was neither, when the contract was first made.

4 *Durnford and East.*

Sale of ship.

101. Notwithstanding the stat. 26 Geo. 3. c. 60. §. 17. enacts, that a bill of sale of a ship shall be absolutely void unless the certificate of the registry be truly and accurately inserted therein, a mere clerical mistake will not vitiate.

Rolleston v. Smith. Hill. 31 Geo. 3. 161.

Smuggling.

102. An inhabitant of *Guernsey*, cannot recover in court of this country the price of goods sold by him there, if he knew it to be buyers intention to smuggle the goods into *England*, and give him assistance for that purpose.

Clugas v. Peneluna. 464.

103. *Per Buller, J.*—Here the plaintiff himself was assisting in the act of smuggling, by the means of packing the goods; this distinguishes the case of *Holman v. Johnson*, from the present.

(See 3 *D. & E. 454. Cowp. 341.*)

Hen. Blackstone.

104. The statute of frauds will prevent a parol agreement to buy goods, without either earnest or delivery, from giving the buyer any property in them; in such case therefore the buyer

ryer cannot maintain *trover* against the vendor who sells
em to another person.

Alexander v. Comber. Trin. 28 G. 3. Page 20

See Blackstone.

105. Where a sale is not immediate, it is not within the Sale imme-
diate.
statute of frauds, such as a contract to purchase a carriage
when it shall be built, &c. *Ib.*

106. (By statute of frauds, "no contract for the sale of
any goods for the price of ten pounds or upwards, shall be
good, unless the buyer accept part of the goods sold, or
gives something in earnest to bind the bargain, or there be
some note in writing of the bargain made and signed by the
parties, to be charged with such contract, or their agents
lawfully authorized.")

107. Where there is an express warranty, the warrantor Express war-
ranty.
undertakes "that it is true at the time of making it, and
"no length of time elapsed after the sale," will alter the
nature of a contract originally false, and if it be false and
fraudulent on the part of the seller, he will be liable to the
buyer in damages, without either a return of the thing or
notice.

Fielder v. Starkin. 19

108. A general merchant undertakes voluntarily without
any reward, to enter a parcel of goods belonging to B. to-
gether with a parcel of his own of the same sort at the cus-
tom-house, for exportation, but makes the entry under a
wrong denomination, by means of which, both parties are
seized, A. having taken the same of the goods of B. as of
his own, not having received any reward, and not being of
a profession or employment, which necessarily implied skill in
what he had undertaken, is not liable to an action for the
loss sustained by B.

Sbiells & another v. Blackburne. Hill. 29 Geo. 3. 158

109. A. the owner of a ship, executes an absolute bill Sale, pledge,
mortgagee.
of sale of it to B. and by another deed of the same date,
assigns other property to B. which deed of assignment, (re-
citing, that the bill of sale was for the better securing a sum
of money lent by B. to A. and also reciting a bond and war-
rant of attorney to secure the same sum) declares, "that these
several deeds and instruments were made to enable B. by
sale of all the things comprised in them, to raise the sum
"lent

“lent without the concurrence of A. at any time before
 “the money should be paid off,” but in this deed, there is
 a covenant, that “upon re-payment of the money B. shall
 “re-convey to A. but so as not to prevent B. from selling,
 “&c. at any time before the full payment, &c. under con-
 veyances; B. is not absolute owner of the ship, but only
 mortgagee, and therefore is not liable for necessities provided
 for the ship, before he takes possession.

Jackson v. Vernon. Hil. 29 Geo. 3. Page 114

Hen. Blackstone.

Id.

110. the mortgagee of a ship cannot maintain an action
 for freight against a third person before he takes possession.

Chinnery v. Blackburne. B. R. East. 24 Geo. 3. 117
 (cited.) *Id.*

Consignor,
 goods *in transitu*.

111. Where the consignee of goods becomes insolvent, the
 consignor may stop them *in transitu*, before the consignee
 gains possession—in such case also, the consignor may stop
 the goods *in transitu*, though the consignee assign the bills
 of lading to a third person, for a valuable consideration, the
 right of the consignor, not being devested by the assign-
 ment.

Mason v. Lickbarrow, in error. 357

Auction, print-
 ed conditions.

112. The verbal declarations of the auctioneer at the
 time of sale, are not admissible to contradict the printed
 conditions.—The plaintiffs in this case, were trustees for the
 sale of an estate which was sold by auction; the printed con-
 ditions stated the premises to be free from all incumbrances
 —they were knocked down to the defendant, who after-
 wards discovered, that the premises were subject to seventeen
 pounds a year. Evidence was offered of parol declarations
 of the auctioneer to that effect, and refused.

Gunnis v. Erbart. 289
 (v. 2 Bl. 1078.—5 Burr. 2639.)

113. An auctioneer employed to sell the goods of a third
 person by auction, may maintain an action for goods sold and
 delivered against a buyer, though the sale was at the house
 of such third person, and the goods were known to be his
 property.

Williams v. Millington. 81
 (v. 5 Burr. 2639.)

114. *Per*

Hen. Blackstone

114. *Per Lord Loughborough.*—An auctioneer has a possession coupled with an interest in goods which he is employed to sell, not a bare custody like a servant or shopman; he has also a special property in him, with a lien for the charges of the sale, the commission and the auction duty, which he is bound to pay—the case is stronger with him, than with a factor, since the law imposes a payment of duty on him—it is not true, that two persons cannot bring separate actions for the same cause, the carrier, and the owner of goods, may each bring actions on a *tort*, the factor and owner may each have separate actions on a contract.

Williams v. Millington. Page 81
(v. 5 Burr. 2639.)

2 *Hen. Blackstone.*

115. A. and B. entered into a verbal agreement for the sale of goods, to be delivered to A. at a future period, there is neither earnest paid, a note or memorandum in writing signed, nor any part of the goods delivered; this contract is void, being within the statute of frauds, though it is executory, and though it has been admitted by B. in his answer to a bill filed in chancery by A.

Executory
void, stat. of
frauds.

Rondeau v. Wyatt. 63

116. *Per Lord Loughborough.*—The provision of the statute with respect to contracts for the price of 10l. would not be of much use, unless it were to extend to executory contracts; for it is from bargains to be completed at a future period, that the uncertainty and confusion will probably arise, which the statute was designed to prevent. The case of *Towers v. Sir John Osborne*, (*Strange* 506) was out of the statute, not because it was an executory contract, but because it was for work and labour to be done, and materials found, as the statute is applicable only to mere contracts of sale—tho' the preventing perjury was one, it was not the sole object of the statute; another object was to lay down a clear and positive rule to determine, when the contract of sale should be complete, the statute therefore has directed, that something specifick should be done, that there may be no room for doubt and hesitation, as that either the party buying should accept and receive part of the goods sold, or give something in earnest to bind the bargain, or that there should be some note or memorandum in writing, to be signed by the parties to the contract.

Ib.

Esponsé, Cases of N. P.

Day certain,
time enlarged.

117. Where an agreement in writing is to be performed on a day certain, and the parties agree to enlarge the time, a declaration on the day stated in the agreement, though the evidence is of a different day, will support the action.

Tresh v. Rake. Page 53

Smuggling.

118. If a foreign merchant sells abroad contraband goods, knowing they are to be smuggled into this country, and assists in the smuggling, he cannot recover the full value of them.

Bernard v. Reed. 91

Copyright.

Copyright.

xford and East.

THE assignee of a print may maintain on the 17
G. 3. c. 57. against any person who pirates it.
Tbompson v. Symonds. M. 33 G. 3. Page 41

In such an action, it is not necessary to produce the
itself in evidence, one of the prints taken from the ori-
plate, is good evidence. *Ib.*

The date must always appear on the print. *Ib.*

Qu. whether on an assignment, the name of the in-
t or the assignee should appear. *Ib.*

Acting a piece on the stage, of which the plaintiff
ought the copyright, is not evidence of a publication
the defendant, within the meaning of the 8 *Ann. c. 19.*
Coleman v. Wathen. E 33 G. 3. 245

Corporation.

Holt.

WHAT acts corporations may do without their
mon seal.

Mayor of Thetford's Case. Page

2. All persons who come into corporations are bound to
take notice of their by-laws.

Brig v. Adams.

Salk.

3. A franchise granted, or corporation erected, must be
regulated by by-laws, though no such power expressed in
their charter.

City of London v. Vanacres.

4. Members are compellable to undergo offices, &c. imposed
by a by-law, even in cases where they may be exempted by
dicted.

5. He that is represented must take notice of the by-laws
of the body representative.

6. A by-law that all strangers shall employ city porters if
is ill.

Cuddon v. Eastwick.

7. But a by-law that none but freemen shall be city porters
seems good.

8. For the freemen are represented by the livery companies
and bound by their acts and by-laws.

City of London v. Vanacres.

9. Elections, &c. to be made originally by the body
large, may by usage and by-laws be restrained to a certain
number.

Butler v. Palmer.

Also the election may be in one body, and approbation by another.

The Queen v. Mayor of Norwich. Page 436

The surrender of a charter of incorporation is void at inrollment.

Butler v. Palmer. 191

Where members under a good old charter, join with others under a new bad one, their acts are void. *Ib.*

A corporation must have a name either expressed in the charter, or implied in the nature of the thing.

Anonymous. 191

They may do an act upon record without their common seal, but not *in pais*.

Mayor of Thetford's case. 192

At common law no officer was bound to sign a return. *Ib.*

They may make a fraternity, and also by-laws to bind strangers for public convenience.

Caddon v. Eastwick. *Ib.*

See the difference between a corporation and a fraternity. *Ib.* 193

They may sue by their name of incorporation, notwithstanding an express power to sue by another.

Whitacre's case. 434, 451

A corporation aggregate may appoint a bailiff to sue, &c. without deed.

Anonymous. 191, 467

and Raymond.

Accepting a new charter may use it as a grant or confirmation.

The King v. Larwood. 32

1. Corporation cannot be effoined or enter into recognisance.

Burghill v. Archbishop of York. 79

2. A custom to chuse members of a corporation and receive them *ad libitum*, ought to be specially averred.

The King v. Mayor of Coventry. 391

23. A corporation

1 Lord *Raymond*.

23. A corporation cannot prescribe in themselves shewing that they are a corporation by prescription.

Pitts v Gaince. Page

2 Lord *Raymond*.

24. A corporation aggregate cannot grant to the head of the corporation.

25. Grant to a corporation for the benefit of the particular members.

Abby v. White. 952.

26. The head of a corporation (and also members *quorum*) must be present at assemblies, but their consent not necessary to corporate acts.

Queen v. Bailiffs of Gippes.

27. A recorder's non-attendance at the sessions of peace is cause of forfeiture.

Ib.

28. A corporation may make a return to a mandamus without the common seal or the signing of the mayor.

Queen v. Mayor of Tbetford.

29. Where a corporation shall retain their old name withstanding a charter that gives them a new name.

30. Where a capital burges quite leaves the borough and resides in another place, he may be removed without notice.

Queen v. Truebody.

31. An elected member of a corporation who sues to be admitted, must prove that he received the sacrament within a year before his election.

Tuiston v. Newinson.

32. The major part of a common council cannot elect a member at a meeting of the corporation summoned for other purpose.

Machell v. Newinson.

33. An election of a member by the other members of a corporation not corporately assembled must be assented to by every one.

Musgrave v. Newinson.

34. An action maintained by foreign corporation.

Henriques v. Dutch West-India Company.

2 Lord Raymond.

35. If a pretended corporation sue and they are no corporation, the defendant may have the benefit of it upon the general issue.

Mackett v. Nevins. 1355

36. A corporation cannot remove a freeman unless by virtue of a charter or prescription.

King v. Mayor of Doncaster. 1566

37. Misdemeanor in the office of chamberlain is no cause to remove a capital burgess. *ib.*

38. A refusal to obey by-laws returned generally is not a sufficient cause of removal. *ib.*

Strange.

39. Where the presence of an officer is required, yet his consent is not necessary.

Cotton v. Davies. 53

40. On a summons of the members if one is omitted, it is not a corporate assembly.

Kynaston v. Mayor of Shrewsbury. 1051

41. Where particular powers are lodged in a select number, they cannot separate and act upon a general summons of the whole body.

The King v. the Mayor of Carlisle. 385

42. Name of a corporation may be acquired by reputation.

Dutch West-India Company v. Moses. 614

43. Plea setting out a bad title to an office, is a confession of an usurpation.

King v. Philips. 394

44. A corporation cannot sue as a common informer.

Weavers Company qui tam v. Forrest. 1241

Hard.

45. Where corporate acts are to be done, not on a charter day by a select body, there must be a summons on each member, except those who have removed from and deserted the borough.

The King v. Mayor of Shrewsbury. 143

46. But where the party is gone to inhabit out of the town, that is deserting and a summons is not necessary. *ib.*

Hard.

47. Where there is a proper summons and notice of a meeting to do a corporate act, there the act of the majority shall bind the whole; but if they meet accidentally the whole must agree.

The King v. Mayor of Shrewsbury. Page 143

48. Though the presiding officer orders all the members to be summoned, yet that is not sufficient unless they really are so. *Ib.* 143

1 Wil.

49. A custom to exclude foreigners in a corporation and a by-law made to support it are good.

Bodwick v. Fennell. 233

1 Black.

50. Corporation being disabled to act, and therefore accepting a new charter, is not dissolved but dormant, and after such acceptance is the same corporation as before.

Corporation of Colchester v. Scaber, P. 6 Geo. 3. 591

51. A majority dissent from the election of I. S. but vote for nobody else, the election of I. S. by the minority is good.

Oldknow v. Wainwright. 229

1 Burr.

52. In restraint of trade is not good without setting forth a particular custom to support it.

Harrison v. Godman. 16, 17

53. Such a particular custom cannot be presumed if not set out. *Ib.*

54. Of a company "to elect upon their livery, such and so many of their members as should seem most meet and convenient to them, on pain to forfeit twenty five pounds on refusing to accept or to pay the admission fee."

Vintners Company v. Passy. 235

55. First—this is a good by-law, for the court will not presume the party elected upon the livery to be unfit or improper for it. *Ib.*

56. Secondly—if the party was really unfit and improper, or had any other reasonable excuse, "*nil debet*" may be pleaded to the action of debt upon the by-law, which will bring

bring it properly before the court; either by giving it in
dence or on issue taken upon it.

Vintners Company v. Passy. 235

57. By-laws ought to have a reasonable not a very rigid
construction.

1 *Burr.*

58. A by-law returned to have been made by the body
at large, may be good, when the power is by charter given
to a select number to make by-laws in the stead, for and in
the name of the whole corporate body, "for they might be
" in fact made by the select body acting in the name of the
" whole corporate body;" and the jury having found "that
the body at large in due manner met, and in due manner
made them," it shall be so intended.

Green v. Mayor of Durham. 131

59. Freedom of corporation may be restrained by by-
law. *Ib.* 132

60. Election given to "the residue (of the portmen) or
the greater number of them assembled in the Council Cham-
ber," was made by one single portman only, being the only
one left; court inclined to support this election, and de-
clared this to be their inclination if it had been material to
have determined it on that point (which it was not because
they judicially determined the case upon another point.)

King v. Richardson. 541

3 *Burr.*

61. First—it is settled that the number of the electors
may be narrowed by a by-law, but not the number of the
eligible.

King v. Spencer. 1833

62. Second,—a by-law cannot strike off an integral part
of the electors. *Ib.*

63. Third,—neither can the makers of a by-law take
the election from others and place it in themselves.

Ib. 1834, 1837, 1839, 1840

64. Fourth,—neither can they superadd a qualification
not mentioned in the charter, nor at all connected with the
corporate characters of the electors.

Ib. 1839, 1840

65. A by-

3 *Burr.*

65. A by-law which lays a restraint upon trade is bad, unless there be a custom to support it.

Hesketh v. Braddock. Page 1856 to 1859

66. A new corporation must take a new charter as it is given; but a corporation already subsisting, are not obliged to accept a new charter in toto: they may act partly under it and partly under their old charter or prescription.

King v. Vice Chancellor of Cambridge. 1656, 1661, 1663

67. The universities are lay corporations, *per* Lord Mansfield, and the crown cannot take away their ancient rights or usages. *Ib.* 1656

68. Where the power of making by-laws is by charter given to a select body, they do not represent the whole body; but where such power is in the body at large, they may delegate their rights to a select body, who become the representative of the whole community.

King v. Spencer. 1837

69. First,—the acceptance of a new charter does not destroy their former rights.

Mayer of Colchester v. Seaber. 1873

70. Second,—the corporation is not dissolved by this judgment of *ouster* against individual members. *Ib.*

71. Third,—neither the removal of their officers nor the change of their corporation name, can extinguish their former rights. *Ib.*—Their old right remain. *Ib.*—And the new charter revives them and puts them into action again. *Ib.*

72. Fourth,—the eleventh *Geo.* the first, chap. fourth, did not consider corporations who had slipped the fixed day for electing chief officers, as being dissolved, but meant to revive their activity, and put them again into motion. *Ib.*

4 *Burr.*

73. A corporation by charter cannot make by-laws inconsistent with the intention or counteracting the directions of their charter.

King v. Cutbush. 2207, 2208

74. First,—it was objected, “that the corporation has no power to exclude an integral part of the body, when the charter has given them the right of electing.” *Ib.*

75. Second,

4 *Burr.*

75. Second,—this by-law made by the mayor and aldermen alone, though assented to by the commonality, cannot take away their right of electing

King v. Head. Page 2521

76. After twenty years unimpeached possession of a corporate franchise, no rule shall be granted, “to shew by what right the possessor holds it.”

Winchelsea Causes. 1962, 1963

77. Charter directs two bailiffs—if the corporation choose only one, or one be ousted by a judgment of *ouster*, one alone cannot act.

King v. Smart. 2243

78. Have such an interest in the mayor's title to his office, that he shall not be permitted to give it up, when those whose rights depend upon it, are desirous to maintain it without any expence to him.

King v. Mayor of Winchelsea. 2279

79. The point of limitation is fixed in the *Winchelsea causes* “of not granting information in nature of *quo warranto*, after twenty years quiet possession,” (*v. supra* under page 1962, 1963,) was strictly adhered to.

King v. Rogers. 2524, 2525

Cowp.

80. Under circumstances of long acquiescence, and where the objection would go to dissolve the corporation, the court might be inclined not to disturb it, though within twenty years.

Rex v. Carter. 59

81. Case against a corporation for not repairing a creek into which the tide of the sea flowed and reflowed, but not saying it was a navigable river, as from time immemorial they had been used: the action lies though no special damage be stated, and saying, “as from time immemorial they have been used,” is well enough without alledging that they were bound, &c. *ratione tenuræ*, or other special cause.

Mayor of Lynn v. Turner. 86

82. Where the power of doing corporate acts is not specially delegated to particular number, the general mode

is for the members to meet on the charter days and the major part who are present do the act.

Rex v. Vario. Page 250

83. Proceedings in Chancery against a corporation for a contempt cannot lie against the offending parties personally, but must be by sequestration of their effects and estate.

King v. Windham. 377

84. The mayor, aldermen and common council assembled, are not sufficiently described by the mayor and commonality and citizens, tho' in fact the latter include the former.

King v. Croke. 29

85. What is or is not a disfranchisement.

Symers et al. v. Regem. 502

86. In general it must be by the act of the whole body.

Ib. 504

87. An order of restoration of a corporation illegally disfranchised, relates to the original right.

Ib. 503

88. How far the rights of the electors can be gone into in a trial of the rights of the elected.

Ib. 16.

89. It cannot be done by surprise and without notice where the voter is in possession.

Ib.

90. Where the right of election is in freemen in their corporate description, whether they were duly chosen or not is not to be tried at the election of a third person,

Ib. 507

91. In a *quo warranto* against particular members, you cannot go into the title of other corporators *de facto*.

Ib. 508

92. When duly met, corporate acts may be done by the majority of those who constitute the meeting.

Ib. 16.

Doug.

93. A charter creating a new corporation, must be accepted *in toto*, if at all. (in note.)

King v. Cambridge. 517

94. 2^a. Whether a charter granted to an existing corporation may not be accepted in part.

Ib. 517

95. The

Doug.

95. The power of a motion is incidental to the body at large in every corporation, unless where it is expressly confirmed to a select part by charter, by-law, &c.

King v. Mayor of Lyme Regis. Page 144 to 154

96. Therefore in a return to a mandamus to restore, if it is stated, that the party was removed by the body at large, it is unnecessary to aver, that the power is vested in them. *Ib.*

97. If the party means to contend that it is confined to a select part, he must alledge it in reply to the return. *Ib.* 154

98. Where non-residence is a good ground of a motion, it is unnecessary before proceeding to remove the party to summon him to come and reside. *Ib.* 152, to 154

99. *Qu.* If the same nicety is required in a charge to ground a disfranchisement as in an indictment.

King v. Lyme Regis. 173 to 174

100. To prove the existence of an aggregate corporation, consisting of different incorporated trades, entries of admissions into the different trades, as the company of carpenters, the company of plaisterers, &c. are admissible evidence.

Carpenters Company v. Hayward. 359, 360

101. The court will not decide the validity of the election of a corporator, if the question is new or doubtful, on a rule to shew cause for an information in the nature of *quo warranto*.

King v. Godwin. 382 to 386

D. & E.

102. Acceptance of charters, their validity and pleadings in *quo warranto* informations.

See the *King v. Amery.* 575

103. The statute of 11 Geo. 1. c. 4. was passed in order to secure the tranquillity of corporations, and to quiet possession, and the court are bound to guard their peace.

King v. Stace. 3

104. Whether the court will grant an information in the nature of *quo warranto*, to impeach a derivative title where the

Corporations

the writs from which it was derived lies in the authority
of parliament—*ib.*

King v. Stone Page 4

1. *Corporations and their*

104. Such writs shall not be impugned by those who
have accepted and acted under it. *ib.*

105. When it is found if a man is 'incorporated' I. would
not take his signature to be a seal, but merely the fact
whether he was named in the books of the corporation books
themselves, and if it is found he had been named, it was not to
be taken that he had been irregularly in.

The King v. Ingham, & Son. 1872. cited in the *King v.*
Stone. *ib.*

106. A corporation created by letters patent, with a
power of making by-laws, cannot make any laws to incur
a forfeiture. *King v. Bond*. 118

107. Neither can a corporation created by act of parlia-
ment, unless such a power be expressly given. *ib.* 118

2. *Duration and Limit.*

108. The court will not grant a criminal information
against the members of a corporation, for a misapplication
of the corporation money, but it is rather a subject for an
application to the court of chancery.

The King v. Watton. 199

110. A judgment of seizure *pro officio*, &c. against a cor-
poration in default of appearance, operates as a final judg-
ment to dissolve the corporation, if they do not appear in
the same term or the next at farthest.

The King v. Avery. 515 to 569

111. The only use of a final judgment in such a case, is
to shew the crown's election to take advantage of the for-
feiture, but any other matter of record shewing the elec-
tion, may equally answer the purpose. *ib.* 568

112. Therefore a new charter of incorporation granted
after that time to a new body of men in the same place is
good, notwithstanding a charter of restitution be afterwards
granted to the old corporation, and such charter of resti-
tution is absolutely void. *ib.*

113. A power

2 *Durnford and East.*

113. A power reserved to the crown in a charter of incorporation, to amove by order of council, one or more of the corporators, which charter also declared, that all or any of them so amoved, should actually and without further process be amoved, and which also provided at the same time that upon such amotion, the remaining corporators might proceed to fill up the vacancies, cannot be exercised to such an extent as not to leave a sufficient number to make a re-election, and therefore an amoval of all is illegal and void.

R. v. Amery. 568

4 *D. & E.*

114. Where a charter required that the mayor and common clerk for the time being, and the common council for the time being, or the major part of them, should elect corporate officers, and directed that the common council should consist of thirty-six, it was held that a majority of the whole number must meet to form an elective assembly, and that if the corporation be reduced to a smaller number than a majority of the whole no election of officers can be had.

The King against Bellringer. Trin. 32 Geo. 3. 810

115. But where a corporation consists of an indefinite number, a major part of the existing body are competent to elect and do other corporal acts.

Ib. 822

116. Whether contemporaneous usage in a corporation may be pleaded in order to controul the words of a charter.

Quere. R. v. Bellringer, Trin. 32 Geo. 3.

Ib. 821

117. A charter of *W. 3.* granted to the town of Liverpool, directs—that the common council men shall be elected in such manner as was used before a former charter of *Car. 2.* the defendant to a *quo warranto*, the information for exercising the office of common council men, pleaded that before the charter of *Car. 2.* the mayor, bailiffs and burgeses used to elect (except at those times when there was any by-law to regulate the mode of election) it was held that the plea was bad, because it did not shew what was the usage in fact before the charter of *Car. 2.*

The King v. Birch. E. 32 Geo. 3. 608

Costs.

Costs.

Holt.

1. **C**OSTS on penal statutes where the interest vested before the action brought, otherwise not.
Company of Cutlers v. Ruslin. Page 172

2. Costs treble on a statute, the words being treble damages and costs. *Lawson v. Story.* 172

3. Costs may be allowed for a malicious trespass though the jury gave less than forty shillings damages.
Dove v. Smith. 194

Salk.

4. Full costs are allowed in trespass where done *clamando titulum*, or the freehold be in question.
Blackly v. Fry. 193

5. The king pays costs for amendments but not for going on to trial. *The King v. Edwards.* 193

6. But where there is a prosecutor he shall pay it in both cases. *ib.*

1 Lord Raymond.

7. Treble costs as well as damages on 2 Will. and Mar. c. 5. for pound breach. *Lawson v. Story.* 19

8. In trespass where the defendant consents to a view, the plaintiff shall recover full costs.
Kempster v. Deacon. 76

9. Party grieved shall have costs in a penal action, but not a common informer. *Bullasis v. Barbriche.* 172

10. Full costs shall be given in trespass removed from an inferior court by *habeas corpus*, though the damages are under forty shillings.
Archbishop of Canterbury v. Fuller. 395

11. Damages

1 Lord *Raymond*.

11. Damages are under forty shillings; in trespass, wounding and disturbing in possession full costs are not to be given,
Boiture v. Woolrick. Page 566

2 Lord *Raymond*.

12. A defendant in replevin shall not have costs on the plaintiff's confessing a plea of *prisal en autor lieu*.
Smith v. Walker. 788

13. In case for words (not actionable) by which the plaintiff lost customers, full costs shall be given, though the damages are under forty shillings.
Brown v. Gibbons. 831

14. Where words are actionable and special damage is laid in aggravation, if the damage found be under forty shillings, the plaintiff shall not have full costs.
Curry v. Perry. 1588

15. Where an action is brought for words, and also for carrying before a justice of the peace, &c. full costs shall be given though the damages are under forty shillings.
Ib. 1589

16. If an executor who sues for money of the testator's as received to the plaintiff's use shall be liable to costs.
Elwes v. Mocata. 865

Strange.

17. When an executor must declare as executor, he shall pay no costs.
Portman v. Came. 682

18. Executor shall pay costs on a writ of error of a judgment after *de-vastavit*.
Caswell v. Norman. 977

19. Administrator discontinues without costs.
Baynham v. Matthews. 871

20. Trespass on the case is not within the statute of *Will.*
3. that gives costs to an acquitted defendant.
Dibben v. Cooke. 1005

21. In trespass for putting diseased cattle into the close, full costs though under forty shillings.
Anderjon v. Buckton. 192

22. In trespass for chasing cattle full costs.
Keen v. Whypier. 534, 551

Strange.

23. Where there is a verdict for the defendant upon a justification, a verdict against him upon the not guilty, shall not entitle to full costs. *Beck v. Nichols.* Page 577

24. A charge of beating the plaintiff's horse, will not entitle him to more costs than damages. *Clarke v. Obery.* 624

25. Full costs not to be given for tearing down hedges without an *assortavit*. *Anonymous.* 633

26. Costs *de incremento* are to be doubled, as well as those given by the jury. *Smith v. Dunc.* 1048

Hard.

27. See the true rule where an executor to pay costs, *et extra.* *Harris v. Hanna.* 193

1 *Bl.*

28. One of two defendants in replevin cannot have his costs if acquitted alone. *Ingles v. Wadworth.—H. 2 Geo. 3.* 355

2 *Bl.*

29. If a plaintiff has a verdict on one count, costs shall be taxed for the whole declaration. *Bridges v. Raymond.—H. 12 Geo. 3.* 800
Norris v. Waldron. 18 Geo. 3. P. 1199

30. In actions of trespass for *crim. con.* with the plaintiff's wife, the plaintiff is entitled to full costs, though the damages are under forty shillings. *Batchelor v. Biggs.* M. 13 Geo. 3. 854

31. In trespass for hunting, brought under the statute 4 and 5 *Will.* and *Mar.* against the defendant as a dissolute person, &c. if the plaintiff proves the trespass, but not the special circumstances of being dissolute, &c. and recovers a verdict for less than forty shillings, he shall have judgment, but no more costs than damages. *Pallant v. Roll.* E. 13 Geo. 3. 900

3 *Barr.*

32. Full costs are no more costs than damages. The question discussed and explained. *Appleton v. Smith.* 1282 to 1284

33. Are

3 *Burr.*

33. Are reciprocal ; wherever the plaintiff would be entitled to them, the defendant is so reciprocally.

Greetham v. Inhabitants of Theale. Page 1724

34. First in an action on a penal statute brought by the party aggrieved, the plaintiff would receive costs if he prevails, therefore he shall pay them if he does not. *Ib.*

35. Secondly, costs to defendants are given. 4 *Jac.* 1. c. 3. f. 2.

36. See also 23 *H.* 8. c. 15. f. 1. and 18 *Elix.* c. 5. f. 3. *Ib.*

4 *Burr.*

37. By an executor or administrator upon discontinuing—first he shall pay costs where it is his own fault or laches.

38. Secondly, he shall have leave to discontinue without paying costs if it be a fair transaction.

Bernet v. Coker. 1928, 1929, 1585

Cowper.

39. Where judgment is arrested, each party pay his own costs. *Cameron v. Reynolds.* 407

Dougl.

40. To entitle constable, justice of peace, &c. to double costs, under 7 *Jac.* 1. c. 5. it must be certified by the judge who tried the cause, that the defendant acted by virtue or reason of his office.

Grindley v. Holloway. 294, 295

41. If there is a plea of tender as to part, and *non-assumpsit* as to the residue, and the issue on the tender being found for the defendant, the balance proved is under forty shillings, yet the defendant, though within the jurisdiction of the county court of Middlesex, is not entitled to costs under 23 *Geo.* 2. c. 33. f. 19.

Hearward v. Hopkins. 431, 432

42. Nor if the debt is reduced under forty shillings by a set off. *Ib.*

43. Where there are issues joined on several counts, and on some a verdict for the plaintiff, and on others for the defendant, the defendant shall not have costs on the part of the record on which the verdict is found for him

Butcher v. Green. 652, 653

2

T 2

44. On

Dougl.

44. On trespass for breaking the plaintiff's close, and digging up the soil upon the place in which, &c. and taking and carrying away the same, if the defendant plead not guilty, and a verdict is found for the plaintiff, but with damages under forty shillings, and the judge does not certify, he shall have no more costs than damages.

Clegg v. Molyneux. Page 749, 750

1 *Durnford and East.*

45. The plaintiff is entitled to no more costs than damages in trespass for an assault, battery, and tearing the plaintiff's clothes, if the jury find that the tearing was in consequence of the beating, and give less than forty shillings damages.

Cotteril v. Tolly. 655

2 *Durnford and East.*

46. Where some issues in the replevin are found for the plaintiff, which entitle him to judgment, and some for the defendant, the defendant must be allowed the costs of the issues found for him out of the general costs of the verdict, unless the judge certify that the plaintiff had probable cause for pleading the matters on which those issues are joined.

Dodd v. Jodrell. 235

3 *Durnford and East.*

47. If the plaintiff in trespass, *vi et armis*, for beating his dog, recover less than forty shillings, the judge may certify under the 43 *Eliz. c. 5.* to prevent his recovering more costs than damages.

Dand v. Sexton. H. 29 Geo. 3. 37

48. Therefore where trespass was brought for pulling down the plaintiff's gates and assaulting him, and the defendants justified to all the counts, (except one) under different rights of way, and pleaded not guilty to the whole, and under the above rule the arbitrator awarded a right of way to the defendants, different from any of those pleaded, and gave five shillings damages to the plaintiff for the assault, as having been committed when the defendants were attempting to exercise the right of way negatived by the arbitrator, the plaintiff can recover no more costs than damages, for the arbitrators award is not tantamount to a judge's certificate, under the 22 and 23 *Car. 2. c. 9.*

Swinglehurst v. Altham. 138

49. In trespass for an assault and battery, where the defendant justifies the assault only, and the plaintiff obtains damages

damages under forty shillings, and the judge does not certify, the plaintiff is entitled to no more costs than damages.

Page v. Creed. T. 29 Geo. 3. Page 391

4 *Durnford and East.*

50. If an executor declare on a trover and conversion in the testator's life time, and also on a trover and conversion after his death, the evidence offered being only applicable to the first count, and he be non-suited, he is not liable to pay costs.

Corkerill et ux. executrix v. Kynaston. E. 31 Geo. 3. 277

2 *Hen. Blackstone.*

51. No action will lie in this court to recover costs.— Ordered to be paid by a rule of an inferior court, in the course of a suit there, notwithstanding the defendant should not be liable to an attachment of the inferior court, by being resident out of its jurisdiction; but such an action having been brought, the court ordered the costs awarded to the plaintiff in the inferior court, to be deducted by the prothonotary from those allowed to the defendant in the action.

Emerson one, &c. v. Lashley. 248

Covenant.

- Definition.** 1. **C**OVENANTS, contra^cta, or agreements, are often used as synonymous terms, signifying an engagement entered into, by which one person lays himself under an obligation to do something beneficial to, or abstain from some act, which if done, might be prejudicial to another.
1 *Bac. Abr.* Page 526
- Covenant in law.** 2. There are some words, which of themselves import no express covenant, yet being made use of in certain contracts, they amount to such, and are therefore called covenants in law.
Ib. 530
- Repealed by act of parliament.** 3. If a man covenants not to do an act or thing which was lawful to do, and an act of parliament comes after, and compels him to do it, the statute repeals the covenant, so it is where he covenants to do a thing which was lawful to do, and an act of parliament comes after, and hinders him from doing it; but if one covenant not to do a thing, which was then unlawful, and an act comes and makes it lawful to do it, such act of parliament does not repeal the covenant. *Ib.*
- To procure conveyance void in law.** *Holt.* 4. A covenant to procure a conveyance, which would be in truth void, binds the covenantor for *valeat quantum volere potest*.
Sc. undon v. Hawley. 174, 177
- Payment of rent-charge, assignee.** 5. A covenant for payment of a rent charge, binds not the assignee or lessee of the grantor, but only the grantor and his heirs.
Brewster v. Kitchel. 175
6. For a warranty, though a covenant real does not bind the land till judgment had in a *warrantia charta*, much less that which is only a personal covenant.

7. Where the covenant is a distinct independent covenant, it is immaterial whether any estate *posse*, and the covenant is not void for want of enrollment of the deed, as where it is provided that if the grantor pay so much money, it shall be lawful for him to re-enter.

Northcot v. Underhill. Page 176

8. In covenant, a general breach is sufficient, and the certainty of description must be such, that if another action be brought, the defendant may plead a former recovery, and aver the transaction to be the same.

Void for want
of enrolment.

Farrow v. Chevalier. 176

9. In debt on bond to perform covenants, the replication must shew a certain breach.

General breach,
Ib. sufficient cer-
tainty.

10. If a covenant is broken before assignment of a lease, &c. it shall not bind the assignee, though assignee be named in it, *secus* if after assignment.

Broken before
assignment.

Grescot v. Green. 177

11. Covenant to convey at the charge of the covenantee, or to convey, and the covenantee covenants to be at the charge of it; the difference is, that in the first case, the covenantor is not obliged to perform, till tender of the charges, but in the second, he is to convey at his peril; and if the covenantee will not pay, he has remedy against him upon his covenant.

Sleer v. Shalecroft. 177

12. A covenant to take advantage of a deed or covenant, amounts to a release or defeasance.

Release, de-
feasance.

Lacy v. Kinnaston. 178, 218

13. Where A. and B. are bound jointly and severally, a covenant not to sue upon that bond, is no release or defeasance, B. may still be sued, because it doth not discharge right, only the remedy, and the right of action still remains against the other obligor.

Not to sue,—
release, defea-
sance.

Ib.

14. Covenant to repair good; damages are always given to repair, &c.

To repair.

Vivian v. Champion. 178, 179

15. The

Heir joins time
of ancestor with
his own.

15. The heir joined the time incurred in the life of his ancestor with his own time, in his declaration on a covenant to repair the premises, being out of repair in the time of the ancestor, and continue so in the time of the heir, and held good.

Vivian v. Campion. Page 178, 179

Party to deed,
person not
party.

16. One party to a deed, cannot covenant with another who is no party, but a mere stranger to it; but one who is not a party to a deed, may covenant with another that is a party, and thereby be bound by sealing the deed.

Salter v. Kidgley. 210

Salkeld.

17. Covenant for non-payment of rent, must be brought where the land lies, though the rent be made payable in another place.

Barker v. Damer. Page 80

Joint covenant.

18. A. and B. *demiserient*, imports a joint covenant, as to the interest granted.

Coleman v. Sherwin. 137

Several.

19. But it may be several, with respect to subsequent acts. *Ib.* 138

Several breaches
assigned.

20. In covenants where a plaintiff assigns several breaches, the defendant may traverse them severally. *Ib.*

Breach, rent.

21. In covenant breach that 3*l.* for a year at lady-day last, was arrear, and held well on general demurrer.

Stagg v Hind. 139

22. Covenant not to buy or sell within two years, breach that divers *diebus* & *vicibus* between such a day and such a day he sold to H. and several others, held well, after verdict as to certainty of times or persons.

Furrow v. Chevalier. 139

Heir, breach,
time of an-
cestor.

23. The heir assigns a breach that the premises were out of repair *tali die*, & *per 10 annos ante*, which included his ancestors time, yet held well.

Vivian v. Campion. 141

Heir, execu-
tors.

24. (Covenants real, or such as are annexed to estates, shall descend to the heir of the covenantor, and he alone shall take advantage of them, *And: 55. Palm. 558.* Covenants in gross, do not descend to the heir of the covenantor.

venantee, *Palm.* 558. For breach in the time of the covenant, the action shall be brought by his executors, tho' the covenant was with him, his heirs and assigns only.)

Vent. 175. 2 *Lev.* 26.

Salkeld.

25. Agreement to convey to H. or his assigns, breach that he did not convey to H. (only) is good. Conveyance to H. or his assigns.

Smith v. Sharp. 139

26. The diversity between a covenant to do an act to, or by one of his assigns, is this;—if a thing be to be done by a man or his assigns, the breach must be in the disjunctive that it was not done by him or his assigns, but where a thing is to be done to a man or his assigns, it is sufficient to assign for breach it was not done to him, for an assignment should be intended to be done to the plaintiff himself, and if he assign his interest, then to the assignee, and if he did assign over his interest, that ought to be shewn on the other side. By A or assigns, to A. or assigns.

Ib.

27. In debt on bond, (except to perform an award), where a defendant pleads matter of excuse that admits a non-performance, the plaintiff need not assign a breach in his replication, for he that excuses a non-performance, supposes it, but though an award be made, it may be void in the whole, or in part. Non-performance, excuse, award.

Meredith v. Alleyn. 138

28. Also in debt on bond to perform covenants, the replication must shew a certain breach, but in action of covenant, 'tis enough to assign a general breach. Bond to perform breach.

Farrow v. Chevalier. 140

29. *Assumpsit* to deliver corn on or before the 5th of *January*, into a barge to be brought by the plaintiff, breach that he did not deliver up on the 5th of *January*, is good. Delivery of goods, day.

Ib.

30. Agreement that A. shall do an act, and for the doing B. shall pay, the former is a condition precedent. Condition precedent.

Thorpe v. Thorpe. 171

31. In a lease, if special days of payment are limited by the *reddendum*, the rent must be computed by that, and not the *habendum*. Lease, *reddendum*, *habendum*.

Tomkins v. Pincent. 141

32. A.

Demise, excepting part.

Salkeld.

32. A. lets a house, excepting two rooms, and is disturbed therein, covenant lies not because they are excepted, and not demised.

Cole's Case. Page 196

Profit appendre.

33. Otherwise where the lessee agrees to let the lessor have a thing as a way or other profit *appendre*, out of the demised premises. *Ib.*

Counter-bond or covenant.

34. Where a counter bond or covenant is given to save harmless from a penal bond, before the condition broken of the first bond, it is forfeited by the breach.

Griffith v. Harrison. 196

Id.

35. Otherwise if given afterwards, or to indemnify against a single bill. *Ib.*

Breach before assignment.

36. Assignee is not liable to a breach incurred before assignment, tho' the lessee covenanted for him and his assigns.

Grescot v. Green. 199

On deed poll.

37. Though covenant may be brought on a deed poll, yet none can bring it, unless named in the deed.

Green v. Horne. 197

(*Vide Salk. 214.*)

Matter dehors.

38. Matter out of the deed that alters the case, cannot be averred. *Ib.*

39. Where deed runs in the first person, signing and sealing makes it a party, though not named therein.

Nurse v. Frampton. 214

(*Vide Vernon v. Jefferys. Str. 1146.*)

To discharge from taxes.

40. Covenant to discharge from taxes, tends only to subsequent taxes of the same nature, not of different natures.

Brewster v. Kitchel. 198

Grantee of rent-charge, assignee.

41. Grantee of a rent charge, can't bring covenant against assignee of the same land. *Ib.*

(*Per Holt. 3 judges contra* held the covenant charged the land.)

42. Diversity

Salkeld.

42. Diversity where a covenant is avoided by subsequent statutes, and where not.

Covenant avoided by statute.

Brewster v. Kitchel.

Page 198

(Vide this case in *Holt*.)

43. Where a conveyance of land is void, (as for want of enrollment) so as no estate passes, all dependent covenants which refer to the estate, and was on it, are void also.

Conveyance void, dependent covenants.

Northcote v. Underhill.

199

44. Otherwise of independent covenants.

Ib.

Id.—independent covenants.

45. A defeasance by another deed may be so pleaded in bar, but the second deed must appear to be intended to operate as a defeasance, and contain proper words for that purpose.

Clayton v. Kynaston.

573

— *Per Holt*, where a proviso goes by way of defeasance of a covenant, it must be pleaded on the other side; otherwise, where by way of explanation or restitution of the covenant.

Ib.

46. A covenant to repair runs with the lands, for it affects the estate of the term, and the reversion in the hands of any person that has it.

Repairs run with lands.

Buckley v. Pirk.

317

47. What words will make a covenant joint or several.

Joint several.

Vide *Robinson v. Walker.*

393

48. *Convenerunt pro se et quolibet eorum.* *Per Holt*,—*quolibet eorum convenit* expressly severs the lien, but *pro quolibet eorum* seems to go to the thing to be done, that is, that they both or either of them would do it.

Id.

Sed reliqui justic. contra.

Ib.

49. Mortgagee covenants, that the mortgagor shall quietly enjoy till default of payment and assigns; after assignment mortgagor is only tenant at sufferance, but his continuing in possession does not turn the term to a right.

Mortgagor, tenant at will.

Smartle v. Williams.

245

1 Lord *Raymond*.

50. In covenant the breach may be assigned as general, as the covenant otherwise in debt upon bond to perform covenants, there a precise breach must be shewn.

Breach as general as covenant.

Brigstock v. Stannion.

106

1 Lord *Raymond*.

Debt on bond,
breach.

51. For in covenant all is recoverable in damages, and those damages shall be for the real damages which the party can prove that he has actually sustained, but in debt on bond to perform covenant in a certain indenture specified, a precise breach must be shewn, because a breach is a forfeiture of the whole bond.

Brigstock v. Stannion. Page 106

Mutual per-
formance.

52. On mutual covenants an action may be maintained by either party without performing his own part, and the other party has his remedy.

Trench v. Trewin. 124

Contingency
first happening.

53. Covenant to pay money on two contingencies, which shall first happen to the plaintiff, shews that one of them has happened, he need not aver that it is the first.

Loggin v. Lord Orrery. 133

Damage, es-
timation of.

54. Covenant to leave mill stones in as good a condition, or to pay the damage to be estimated by A. the covenantor must procure the estimation.

Studholme v. Mandell. 279

Covenant, co-
extensive with
estate.

55. Covenant to pay a rent clear of taxes to the grantee and his heirs will include assigns as the estate was in fee, the covenant is co-extensive.

Brewster v. Kitchen. 320

Covenant re-
peal by act of
parliament.

Where an act of parliament will repeal a covenant.

Ib. 321

56. (Things lawful at the time of the covenant, afterwards prohibited, the covenant is binding.

3 *Mod.* 39. 1 *Vent.* 175.)

Personal co-
venant, taxes.

57. Tenant in fee, covenants to pay a rent charge clear of taxes, an action will not lie upon this against his assignee, for it is a mere personal covenant, and cannot run with the land.

Ib. 322

Lands in
jointure, value
of.

58. Covenant that lands limited in jointure, are and shall continue to the value of, &c. extends to all the limitations as well as to the jointure estate.

Anonymous. 365

Independent
re-entry on
payment, &c.

59. A covenant, that if defendant on such a day paid so much money he might re-enter in a deed of bargain and sale not enrolled is binding, for it does not depend on passing the estate.

Northcot v. Underbill. 388

60. Where

1 Lord *Raymond*.

60. Where a covenant to discharge a man from his agreements shall amount to a defeasance.

Amounting to defeasance.

Clayton v. Kinafton. Page 421, 689

61. Two deeds made at the same time, one shall not be construed a defeasance to destroy the other, so that the deed should be void as soon as made. *Ib.*

62. In the case of a condition subsequent, there is no need to aver performance; otherwise of a condition precedent.

Condition subsequent, performance. *Ib.*

63. Assignment of a bond is a covenant that the assignee shall receive it.

Assignment of bond. 683

2 Lord *Raymond*.

64. By *A.* to make assurance to *B.* at the costs of *B.* *A.* must give notice what assurance he will make before *B.* is to tender the costs.

To make assurance.

Heron v. Treynr. 750

65. In covenant, if the defendant pleads an ill bar, and the plaintiff replies and assigns an ill breach, the defendant shall have judgment.

Ill bar, ill breach.

Armit v. Breame. 1081

66. An action of covenant will lie on the word *assignavit*, in the assignment of a bond.

Lies on the the word *assignavit*.

Seignoret v. Noguire. 1242

67. Covenant that shares in a company, shall be sold to make good losses, &c. an assignment by way of security, and the condition not broken is not a sale within this covenant. *Ib.*

Shares in company.

68. Covenant maintained on the word *demisit* or *assignavit*.

Demisit.

Frontin v. Small. 1419

Strange.

69. In covenant the plaintiff need not set out a title, *quod cum dimississent* is enough, and if he does it imperfectly it is surplusage.

Title not necessary.

Aliberry v. Walby. 230

70. As by not setting out a descent regularly, but otherwise if he set it out wrong. *Ib.*

(Vide *Dougl.* 315.)

71. In a covenant to pay or cause to be paid, the breach may be generally assigned that he did not pay.

Pay or cause to be paid.

Ib. 231

72. A

Strange.

To save harmless, tortious acts.

72. A covenant to save harmless against all persons, extends not to tortious acts; *secus* where it is particular against the acts of a particular person.

Perry v. Edwards. Page 400

73. (Vide 1 *D. & E.* 671. 3 *D. & E.* 584. *Dougl.* 43.)

Condition precedent.

74. When the act is to be done (in this case transfer of stock) upon payment, there is no colour to make the transfer a condition precedent.

Blackwell v. Nafb. 535

To pay rent, no enjoyment.

75. Where there is a covenant to pay rent, an action lies though the lessee has no enjoyment by the default of the lessor.

Monk v. Cooper. 763

Id.

76. This was an action of covenant for a year's rent, from Michaelmas 1725 to 1726 :—the defendant was bound as lessee by covenant to repair in all cases, except fire, and pleaded that before Michaelmas 1725, the premises had been burned down, and not rebuilt by the plaintiff, so that he had no enjoyment for the whole year for which the rent is demanded, but on demurrer the plaintiff had judgment, for the covenant to pay rent was express, and if the defendant had any injury he had the remedy, but could not set it off against the demand for rent. *Id.*

(Vide *Holt* 175. and 1 *D. & E.* 310.)

Express covenant.

77. (In covenant for rent against executrix of lessee, who was one of the directors of the South Sea Company, held that 7 *Geo. 1. c.* 28. which vested their estate in trustees, did not discharge him from the express covenant.

Hornby v. Houlditch. Andrews. 40)

Id.

78. (If a man covenants to do a certain thing before a certain time, though it becomes impossible by the act of God, yet this shall not excuse.

1 *Roll. Ab.* 450.)

In law, executors.

79. On a covenant in law, no action lies against executors.

2 *Brownlow.* 204

80. (If a covenantor disables himself from performing a covenant, an action lies against him immediately.

Cro. El. 719)

81. Covenant

Strange.

81. Covenant not to plow meadow, only extends to what was really meadow at the time of the demise. Not to plough meadow.
Skipwith v. Greene. Page 610

82. Tenant shall not be estopped, the land is called meadow in the lease, which was really arable. *Ib.*
 (Vide 4 *Burr.* 2228, and 6 *Brown Cas.* p. 470.)

83. Where the covenant is joint and several in an action against one only, the breach may be assigned in the neglect of both ; *per cur.* perhaps the other never sealed the deed, and one man may covenant for the act of another.
Lilley v. Hedges. 553
 (Vide *Vernon v. Jefferys. Str.* 1146.)

84. Where there is a joint covenant by several, all should join in the action, this may be taken advantage of on a demurrer. If one named in the indenture does not seal, he must be excluded by an averment. Covenant by several, all join.
Vernon v. Jefferys. 1146

85. Debt lies on a covenant in a deed.
Hooper v. Shepherd. 1089

Hardwick.

86. Defendant may plead eviction by a stranger, but in such case he must aver, that before the time in the demise, the evictor was seized in fee, &c. or else trace up his title, and he must expressly shew what the title of the evictor was for, possibly he had no title of entry, though he had a title to recover in a real action. Eviction by stranger.
Jordan v. Twells. 161

87. In cases of covenant for quiet enjoyment, it is sufficient if you assign the breach in the words of the covenant, so you shew that the title of the evictor was not derived from the plaintiff himself, but in this case here is no assignment of breach following the words of a particular covenant, for aught appears this eviction might be by collusion. Quiet enjoyment.
Ib.

2 *Wils.*

88. Covenant upon a lease made by the committee of a lunatic, will not be for the committee, because he cannot by law make such a lease. Committee of lunatic.
Knipe v. Palmer. 130

89. Covenant

Repairs, re-
version not in
lessor.

2 *Wils.*

89. Covenant as heir upon a lease for years and assigns for breach the want of repairing, defendant pleads that the lessor was only tenant for life, and traverses that the reversion was in him and his heirs: this is well pleaded, for the covenant determined with the estate on which it was founded.

Brudnell v. Roberts. Page 143.

(*Vide Cro. E.* 916.)

Covenant
not discharged
without deed.

90. Covenant for payment of money which is by deed, cannot be pleaded to be discharged without deed.

Rogers v. Payne. 376

91. If debt is brought for the penalty, and issue joined on *nil debit*, the jury should not give a verdict for the whole, but assess damages for each breach assigned.

Drage v. Brand. 377

(*Vide Comp.* 357.)

92. Covenant as heir upon a lease for years and assigns for breach the want of repairs; defendant pleads that the lessor was only tenant for life, and traverses that the reversion was in him and his heirs, this is well pleaded.

143

3 *Wils.*

Running with
tithes.

93. Lessee of tithes covenants for him and his assigns, that he will not let any of the farmers in the parish have any part of the tithes, this covenant runs with the *tithes*, and binds the assignee against whom the action is brought for breach of covenant.

Bally v. Wells. 25

Running
with land,
collateral.

94. Concerning covenants, which of them are (as it were) *inherent*, and run with the land, and which of them are only collateral, and do not run with the land.

Ib. 27, 28, &c.

95. When the covenant extends to a thing in *esse* parcel of the demise, the thing to be done by force of the covenant, is in a manner annexed to and appurtenant to the thing demised, and shall run with the land, and shall bind the assignee, though not bound by express words, as to repair the houses; otherwise if the thing to be done be merely collateral to the land and not concerning the thing demised, as to build a house on land not parcel of the demise, or to pay any collateral sum of money to the lessor or to a stranger, this shall not bind the assignee; there must always be a priority between the plaintiff and defendant,

to make the defendant liable to an action of covenant.

Spencer's Case. 5 Rep. 16. cited. Page 27, 28

96. Lessee for 21 years, covenants not to assign, &c. he makes an under lease for part of the term, this is not a breach of the covenant. Assignment, under lease.

Crusoe v. Bugby. 234

97. One covenant cannot be pleaded in bar of another covenant. One covenant in bar of another.

Cooke v. Colcraft. 307

1 Black.

98. Assignee of a lease assigned after covenant broken by the lessee not liable for the breach. Judgment after breach.

Church-wardens of St. Savicur's, Southwark, v. Smith.
H. 2 Geo. 3. 351.

99. *Per Lord Mansfield* — The only question is whether, when a breach of covenant is complete, and an assignment afterwards made, the assignee is liable for a breach which he never committed. Ib.

1 Black.

100. Where there is a special penalty in a covenant, (as a charter party) the plaintiff may either proceed for the penalty and rescind the contract, or bring an action on the case for the breach of contract, and waive the penalty, in which case he may recover more than the penalty.

Winter v. Trimmer. 395

2 Black.

101. Covenant not to assign, set over, or otherwise do to put away the lease or premises demised, does not extend to an under lease for part of the term. Assignment, under lease.

Crusoe on the demise of Blencowe v. Bugby. T. 11 G. 3.
766

102. On a covenant, (that in consideration of a weekly payment to A: and his executors for the lives of A. and his wife, A. shall not exercise a particular trade) the executors of A. are not bound to abstain from exercising it in consequence of this personal covenant of the husband. Not to exercise a trade, executors.

Cooke v. Colcraft. H. Geo. 3. 856

103. Upon a plea of *non est factum* in covenant, the lessee in possession being defendant, shall not controvert the title of the plaintiff his lessor to demise. Non est factum, title.

Friend v. Eastbrook. E. 17 Geo. 3. 1152

2 *Blackstone*.

Id.

104. *Per Curiam*.—It is otherwise in ejectment, (see *Treppert's case*, 6 Co. 14.) The plea of not guilty, puts in issue the demise of the lessors of the plaintiff, and their title to make such demise; in ejectment, the title must be shewn, but on the issue of *non est factum* in covenant only, the deed must be proved—the issue here is, that there is no such deed as stated in the declaration, and if in fact such a deed appears, the defendant, who is in possession under it, shall not question the title of the plaintiff, to make such demise, and thereby evade the performance of what he himself has stipulated.

Friend v. Eastbrook. E. 17 G. 3. Page 1152

Breach of
covenant nega-
tive, condition
precedent,
mutual cove-
nant.

105. *Non infregit conventionem*, not an issuable plea to a breach of covenant assigned in the negative—if one party covenants to do one thing, the other party doing another—this is not a condition precedent, but a mutual covenant, and one cannot be pleaded in bar of the other.

Boone v. Eyre. T. 19 G. 3. 1312

1 *Burr*.

Repairs.

106. Covenant in a building and repairing law, to leave the demised premises with all new erections well repaired, was construed to extend to the new erection only; a sum of money being agreed to be laid out in new erections, and rebuilding, and the covenant to keep in repair extends only to new erections.

Lant v. Norris. 287

2 *Burr*.

Joint and
several execu-
tor.

107. By two joint lessees, if it be joint and several, shall bind the executors of the deceased lessee, even tho' he died before the term commenced, and the whole term, interest and benefit survived to the other lessee.

Enys v. Donnithorne. 1197

Covenant
with two or
more.

108. If A covenants to do an act for the benefit of two or more, and A breaks his covenant, one of them alone cannot maintain his action of covenant against him, for then he might be doubly or trebly charged for the same breach.

(5 Co. 18. B. 2 Roll. A. 149. Telv. 177.)

3 *Burr*.

Not revok-
able.

109. A covenant is not revokable (as a will is.)

Wright v. Littler. 1256

To stand seiz-
ed, revocation
of will.

A covenant "to stand seized to uses," is not a revocation of a will.

110. Covenant

3 *Burr.*

110. Covenant by a lessee for himself and his assigns, to build a new house on the premises within a limited time, which is not done within the time limited—after the expiration of the time limited, the lessee assigns; the assignee is not liable, because the breach was committed before his time, and this covenant does not run with the land. Breach before assignment, running with land.

Churchwardens of St. Saviour's v. Smith. Page 1272, 1273

111. *Per Lord Mansfield.*—An assignor cannot be liable for a breach which he never committed. *Ib.*

112. Where covenant of testator, or intestate may be given in evidence by an executor or administrator. Covenant of testator, evidence by executor.
Plumer v. Marchant. . 1383, 1384
(See Executor.)

113. "To stand seized" (entered into by the owner) may be a lease. To stand seized, a lease.
Right v. Thomas. 1446
(See *Power's Lease.*)

114. A covenant to stand seized, is a conveyance of the land since the statute of 27 H. 8. *Ib.* Id.

115. An express covenant by a master of a ship, to go to *Winyaw* in *Carolina*, there to receive the plaintiff's goods, (for which the plaintiff covenanted to pay such and such freight) provided that if his ship should not be arrived there before such a day, it should be at the plaintiff's option to load the ship on the agreed terms or not, the defendant was bound to go at all events, tho' it appeared that it was impossible he could be there at the time from storms and other causes. Express covenant, tho' impossible to perform.
Shubrick v. Salmond. 1637 to 1640

116. An express covenant shall bind to performance, where an implied one, or one erected by law, shall be excused by a disability to perform, which happens without the parties default or power to prevent. Implied covenant. *Ib.*

117. This proviso was intended to quicken the defendant, but shall not excuse him for not going at all. *Ib.* 1640 Id.

118. *Per Lord Mansfield.*—"The distinction between the construction of covenants implied by operation of law, and express covenants is, that express covenants are taken more strictly, and a man may, without consideration, enter into Express, implied.
U 2 into

into an express covenant, under hand and seal to the performance of which he is at all events bound."

119. (Vide 20 E. 3. *Counterpl de Garranty*, 7 Co. L. 384.—*Nokes Cases* 4 Co. 80.—In covenant indeed, an action will be only for a misfeasance, but not for a nonfeasance, as if a man grants a way, covenants lies for stopping it up, but not for letting it out of repair.

1 *Saunders* 321.)

4 *Burr.*

120. *Per Lord Mansfield*.—There is a difference between covenants in general, and covenants secured by a penalty or forfeiture, in the latter the obligee has his election to bring an action of debt for the penalty, after a recovery of which, he cannot again resort to the covenant, because the penalty is a satisfaction for the whole, or he may waive the penalty, and proceed on the covenant, and recover more or less than the penalty, *toties quoties*.

Lowe v. Peers. 2225

Collateral covenant, bankrupt.

121. An express collateral covenant to indemnify, shall bind a bankrupt, for it was not a debt due at the time of the bankruptcy, and could not be proved *under it*.

Mayor v. Steward. 2446

(See Bankrupts.)

Cowper.

Covenants on each side, non-performance, set off.

122. Where there are covenants, to be performed on each side, the defendant cannot take an advantage of the non-performance of the plaintiff's covenant by way of set off, unless the plaintiff's covenant was for payment of a sum of money.

Howlet v. Strickland. 56

123. *Lord Mansfield*.—The act of parliament and the reason of the thing, relate to mutual debts only, these damages are no debts, an *indebitatus assumpsit* could not be brought for them. *Ib.*

To sow clover among barley.

124. Covenant to permit plaintiff in the last year of the term, to sow clover among the barley and oats, sown by the defendant.—Breach, that the defendant sowed barley and oats, without giving notice to the plaintiff.—Plea, that the defendant did not prevent the plaintiff from sowing as much clover as he thought fit, and upon demurrer adjudged a good plea, for the covenant makes no mention of notice to be given.

Hughes v. Richman. 125

125. *Ib.*

Cooper.

125. In debt for a penalty for non-performance of covenants, judgment on demurrer may be entered up for the penalty, in like manner as before the stat. 8 & 9 W. 3. c. 11.—but then it can stand out as a security for the damages sustained, and breach cannot be assigned until after judgment over.

Penalty, judgment, non-performance, covenants.

Goodwin v. Crowle. Page 357

126. You cannot go to issue on a general averment of performance.

Sayre v. Minns. 578

127. For the question must be reduced to some degree of certainty, and notice given of what is to be agitated at the trial.

Ib.

— (By stat. 8 & 9 W. c. 10.—In debt on bond for performance of covenants, plaintiff may assign as many breaches as he pleases, and the jury shall assess damages for such as have been broken—and in case of judgment on demurrer, or by plaintiff may suggest breaches, &c. upon which an inquiry shall go—the judgment to remain as a security to indemnify against further breaches.)

128. In a declaration in covenant, so much only of the substance of the deed, and the covenant, shall be set out as will shew the plaintiff's title.

Declaration, what to contain.

Dundas v. Lord Weymouth. 665

129. As that by indenture, certain premises therein mentioned, were demised without stating them particularly, subject amongst other things to a proviso, setting out the substance of the covenant, and the breach.

Ib.

130. If more be inserted, the court will refer it to the master, to strike it out with costs, and will animadvert upon the drawer of the declaration.

Ib.

(*Price v. Fletcher*, 727.)

131. If a lessee covenant not to *under-let* without the consent of the lessor *under hand and seal*, with a power of re-entry in case of a breach, *acceptance* by the lessor of rent due *after* the condition broken, with full notice, is a waiver of the forfeiture.

Not to underlet, waiver of forfeiture.

Goodright v. Davids. 803

132. Instance, where the act of the lessor, and his ancestors, by *repeatedly inserting* in different renewals of a lease

For perpetual renewal.

for

for lives, a *covenant to renew under the same rent and covenants*, was held to construe such covenant, though doubtfully worded, a covenant for perpetual renewal.

Cooke v. Booth. Page 819

Cowper.

133. *Ricus in arrears* is a good plea to an action of *debt* for rent, for it is the same as saying, *nil debit*.

Warner v. Theobald. 588

134. *Secus* in an action of covenant, admitted *arguendo*.

Ib.

Douglas.

No form of words.

135. No set form of words is necessary to constitute a covenant.

Stevens v. Carrington. 27

Any words amounting to an agreement.

136. Any words amounting to an *agreement* if under seal, are sufficient.

Chancellor v. Poole. 737

(*Leon. 324. 1 Roll. A. 518.*)

Quiet enjoyments, *baron and feme*, Executors liable.

137. If there is a *power* for *husband and wife* jointly, to declare the uses of a fine of the wife's estate, and the husband covenants with A. lessee for quiet possession, against any person claiming under the husband, his executors shall be liable, if the lessee is evicted by a remainder-man, claiming under a joint execution of the power.

Hurd v. Fletcher. 43 to 45

(*Vide Str. 400. 1 D. & E. 671. 3 D. & E. 584.*)

Covenant for rent, under-tenant not bound.

138. A covenant for *rent* in a *lease*, does not bind an *under-tenant*, because not assignee of the whole term.

Heldford v. Hatch. 174 to 178

To do particular thing, party prevented.

139. If one covenant to do a certain act, in consideration of a reward, and the other party prevent the stipulated thing from being literally done, and accept something else as an equivalent, he may be sued for the reward, and the reason of the non-compliance with the literal terms averred in the declaration.

Hotbam v. East India Company. 259 to 266. 659 to 669

Against original lessee before possession, assignee.

140. Covenant will lie against an original lessee, before he takes *actual possession*; the rent is due by him in respect of the contract, but an assignee is only liable in respect of the thing enjoyed.

Eaton v. Jacques. 440

141. 19

Dougl.

141. In the case of *Walker v. Reeves*, Lord Mansfield said, that by the assignment the title and possessory right passes, and the assignee becomes possessed in law, as therefore an assignee is only liable while in actual possession, if he assigns over before a breach, though *his* assignee had not taken actual possession, yet he (the first assignee) is not liable to an action of covenant in this case, where the defendant was the assignee of the original lessee, and covenant being brought against him for rent reserved on the lease by an assignee of the reversion, he pleaded, "that before the rent became due, he had assigned all his interest in the premises to one *Rigg*, who by virtue of such assignment entered and was possessed, the plaintiff replied, that at the time when the rent became due, the defendant *remained and continued in possession, absq. noc.* that *Rigg* had entered, &c. and on demurrer it was held, that the assignment being admitted, the actual possession was not sufficient to charge the first assignee, the possession in law being in the second assignee by virtue of the assignment—there is no privity of contract here between the defendant and the lessor, to support the action of covenant.

Walker v. Reeves, (in note.) Page 444

142. Covenant will lie against an assignee, under an absolute assignment of the whole interest in the term.

Assignee of whole interest.

Ib. 444 to 446

143. But not against a mortgagee of the term, even after the mortgage is forfeited, 'till he takes actual possession.

Mortgagee, actual possession.

Ib. 438 to 444

244. (Lessee has from his covenant both a privity of contract, and of estate, and though he assigns, and thereby destroys the privity of estate, yet the privity of contract continues, and he is liable in covenant, notwithstanding the assignment, but the assignee comes in only in privity of estate, and he therefore is liable only while in possession.

Vide *Dougl.* 736, 441

145. In a covenant, indenture of apprenticeship under 5 *Eliz. c. 4.*—between the father, the son, and the master; the father is answerable in covenant, for what is to be performed by the son.

Indenture of apprenticeship, father, son.

Branch v. Ewington 500, 501. & n.

146. In a declaration in covenant, it is only necessary to state as much of the deed as will shew the plaintiff's title.

Declaration, what to state.

Brislow v. Wright. 642

147. And

Doagl.

Id.

147. And that need not be done in *hac verba*, but according to legal effect. *Ib.* Page 642, 64

148. (But it ought to state the deed in which the covenant is contained, whether bargain and sale.

Feoffment, &c. 5 Com. D. 232.)

149. (If the deed be in nature of a defeasance, &c. or if the words be merely conditional to determine the estate, or if they be only a qualification of the words on the other part, covenant will not lie.

1 Roll. A. 518.)

Two parties,
one ready to
perform.

150. When something is covenanted or *agreed* to be done by each of two parties at the same time, he who was ready, and offered to perform his part, but was discharged by the other, may maintain an action against the other, for non-performance of his part.

Jones v. Barkley. 659 to 669

Three kinds
of covenants.

151. *Per Lord Mansfield.*—There are three kinds of covenants, 1. mutual and independent covenants, where either party may recover *damages* for a breach by the other, and it is no excuse for the defendant to alledge a breach by the plaintiff of the covenants to be performed by him. 665
(*Vide 1 Lord Raym. 124. 2 Black. 1312*)

Id.

152. 2d. Conditional and dependent, where the performance of the one, is a *condition precedent* to the performance of the other. *Ib.*

(*Vide 1 Str. 535. Salk. 171.*)

153. 3d. There is also a third sort of covenants, which are mutual conditions, to be performed at the same time, &c.

(*Vide 1 Str. 504.*)

154. *Per Lord Mansfield.*—The dependance, or independence of covenants, is to be collected from the evident sense, and meaning of the parties, and however transposed they may be in the deed, their precedency must depend on the order of time, in which the intent of the transaction requires their performance. *Ib.*

Condition
precedent.

155. Instance, where covenants or agreements are conditions precedent, and where not. *Ib.*

156. Instances

Dougl.

156. Instances, where a party has done enough to entitle himself to an action of covenant or upon an agreement, in-
stance where he has not. Agreement sufficient to found the action.
660 to 666

Ib. Page 666 to 668

157. In an action of covenant if the title is stated, it must be exactly stated, and it is a fault to have departed from it. Stating title.

Polyblank v. Hawkins. 315
(Vide 1 *Str.* 229.)

158. On a dissolution of partnership by a covenant, that the plaintiff shall have the moiety of goods in a ware-house, which is to be the defendant's—the defendant is not bound to deliver the goods. Performance by delivery.

Stevens v. Carrington. 27

Durnford and East.

159. Bankruptcy is a plea to an action of debt, on an implied covenant for rent, the *reddendum* in a lease. Bankruptcy.

Wadham v. Marlowe. (cited.) 92

160. The court held, that an action of debt on the *reddendum* against a lessee, whose estate had been transferred by law to an assignee, could not be maintained—this case went on an acceptance in law, because every man's assent is included in an act of parliament, and an action of debt arises out of the perception of the rents and profits—on an *express* covenant to pay rent, covenant lies against the lessee for rent arrear, after his assignment. Express covenant.
Ib.

161. In the case of the South-Sea Company, the act of parliament (which is a publick one) by which all their property was vested in trustees for the satisfaction of the creditors, was held no bar to an action of covenant. Property vested in trustees, yet action.

Hornby v. Houlditch. (cited.) 92

162. A. is tenant for life, and B. the reversioner, A. only executes a lease, in which they are both named on A.'s death, it is totally void, though the reversioner executes it at any time afterwards—he can never set up such lease against the lessee, for it is not his covenant. Void against reversioner.

Ludford v. Barber. 95

(See Lease.)

1 *Durnford and East.*

Renewal.

163. A. and B. covenant in a lease for 61 years, "that at any time within one year after the expiration of 20 years, of the said term of 61 years, upon the request of the lessee, and his paying 6l. to the lessor, they would execute another lease of the premises to the lessee for and during the further term of 20 years, to commence from and after the expiration of the said term of 61 years, and so in like manner at the end and expiration of every 20 years, during the said term of 61 years, for the like consideration, and upon the like request, would execute another lease for the further term of 20 years, to commence at and from the expiration of the term then last before granted, &c. under this *covenant*, the lessee cannot claim a further term of 20 years in the lease, if he has omitted to claim a further term at the end of the first and second 20 years in the lease.

Rubery v. Invoise, & another.

Page 229

Express covenant, enjoyment.

164. A lessor who covenants to pay rent, and to repair with an exception of casualties by fire, is liable upon the covenant for rent, though the premises are burnt down, and not rebuilt by the lessor after notice.

Belfour v. Weston.

310

(Vide *Str.* 763. & 2 *Lord Raym.* 1477.)

Condition precedent.

165. A covenant in a charter party, "that no claim should be admitted, or allowance made for short tonnage, unless such short tonnage be found, and made to appear on her arrival on a survey, to be taken by four shipwrights, to be indifferently chosen by both parties," is not a condition precedent to the plaintiff's right of recovering for short tonnage, but is a matter of defence to be taken advantage of by the defendant, and the not averring performance, is no ground for arresting the judgment.

Hotbam v. East India Company. 638

Quiet enjoyment, entry, claiming title.

166. If a lessor covenant for quiet enjoyment against the lawful let-suit entry, &c. of himself his heirs, and assigns, the declaration for a breach of the covenant, need not expressly alledge that he entered claiming title, if the disturbance complained of be such as clearly appears to an assertion of right.

Lloyd v. Tomkies. 671.

167. The breach of covenant here was, locking up two pews in a church, which had been parcel of the demise on which the covenant was made, the grantor shall not be admitted

mitted to say, that the act was *tortious*, and so not within the covenant, it clearly appearing to be a claim of right.

Lloyd v. Tomkies. Page 671

168. (If a man makes a lease for years by the words *concessit* or *demisit*, these import a covenant, and if lessee or his assigns be evicted, they may bring their action. Implied covenant.

Cro. E. 214. Roll. A. 519.)

1 Durnford and East.

169. In covenant on a charter party, by which it was agreed to employ a ship, of which the plaintiff was the captain, as soon as *condemnation should have passed*, the sentence must be taken to mean a *legal* sentence, and the party who sues for the freight must aver, that the ship was condemned by a court having competent jurisdiction. On charter party.

Unwin v. Wolsley. 674

170. Under a power to a tenant for life, to lease for years, reserving the *usual* covenants, &c. and a lease made to him containing a proviso, that in case the premises were blown down or burned, the lessor should re-build, otherwise the rent should cease, is void, the jury finding that such covenant is unusual. Covenant unusual.

Doe on the demise of Ellis & Medwin v. Sandham. 705

2 Durnford & East.

171. Where two persons enter into articles of partnership for 7 years, in which is a covenant to account yearly, and to adjust and make a final settlement at the expiration of the partnership, and they dissolve the partnership before the 7 years are expired, and account together and strike a balance, which is in favour of the plaintiff, including several *items* not connected with the partnership, and the defendant promises to pay it, an action of *assumpsit* lies on such express promise. Covenant to account, *assumpsit*, balance.

Foster v. Allanson. 479

172. An action of *assumpsit* may be maintained upon an express promise, for the amount of a balance struck on a partnership account, though there was a covenant between the parties to account. *Assumpsit*, the covenant.

Moravia v. Levy. (in note.) 483

3 Durnford and East.

173. A mortgagor and mortgagee make a lease, in which the covenants for the rent and repairs are only with the mortgagor and his assigns, the assignee of the mortgagee cannot maintain an action for the breach of these covenants, because Mortgagor, mortgagee,

collateral covenant.

because they are collateral to his grantor's interest in the land, (not being made with the person who had the legal estate) and therefore do not run with it.

Webb v. Russell. T. 29 Geo. 3.

Page 393

3 *Darnford and Ea.*

Mortgagor,
covenants in
gross.

174. But the mortgagor himself may maintain an action of covenant against the lessee, the covenants being in gross.

Stokes v. Russell. T. 30 Geo. 3.

678

(See 1. Hen. B'. 562. See Mortgage.)

—If tenant for years lease for a less term, and assign his reversion, and the assignee take a conveyance of the fee, by which his former reversionary interest is merged, the covenants incident to that reversionary interest, are thereby extinguished.

Webb v. Russell.

393

Id.

Lord *Kenyon*.—These are covenants entered into with a stranger, that do not run with the land, (collateral covenants) and the rent is incident to the reversion out of which the term is carved, and that reversion is gone. *Ib.*

Id.

175. By 32 H. 8. c. 34. grantees of reversions have the same remedy against lessees, their executors, &c. as their grantors had. *Ib.* 393

Peaceable enjoyment,

insurrection in
America.

176. A covenant in a conveyance of lands in *America*, during the time of the rebellion in that country, that the grantor had a legal title, and that the grantee might peaceably enjoy, &c. without the let, interruption, &c. of the grantor, and his heirs or of any other person whomsoever, is not broken by the States of *America* seizing the lands as forfeited for an act done previous to the conveyance, notwithstanding the subsequent acknowledgment of their independence by this country.

Dudley v. Follisott. E. 30 Geo. 3.

584

Id.

177. Such a covenant does not extend to the acts of wrong doers, but only to persons claiming by a legal title, for "let, interruption, &c." means "lawful let and interruption." *Ib.*

178. *Per Curiam*.—Even a general warranty, which is conceived in terms more general than the present covenant, has been restrained to lawful interruption. *Ib.*

Durnford and East.

179. A. asserting that he had a right to a patent machine, covenanted with B. that he should use it in a particular manner, in consideration of which B. covenanted, that he would not use any other; in an action by A. on the covenant B. is not estopped by his covenant from pleading in bar to the action, that the invention was not new, or that the patentee was not the inventor, but he may thus shew that the patent was void. Estoppel,
patent.

Hayne v. Maltby. Page 438

180. Plaintiff covenanted to build two houses for 500l. by a certain day, and averred in an action of covenant an article of agreement, for the money performance, and that the houses were built within the time. Evidence that the time had been enlarged by *parole* agreement, and the houses finished within the enlarged time, did not support the declaration. To build
within certain
time;
enlarged by
parole.

Little v. Holland. E. 30 G. 3. 590, 592

181. Where the plaintiff declares in covenant on any deed, he shall not be allowed to go into evidence of any matter out of the deed to support his action, for the proof must correspond with the declaration. Matter dehors
the deed. *Ib.*

182. The breach of a covenant being assigned thus, that the defendant had not used a farm in a husband-like manner, but on the contrary had committed waste, it was held that the plaintiff could not give evidence of the defendant's using the farm in an unhusband-like manner, if it do not amount to waste. Waste.

Harris v. Mantle. 307

4 Durnford and East.

183. On covenant which runs with the land evidence, that the defendant is in as heir, will support a declaration, charging him as assignee of the reversion. Running
with land, heir,
assignee of re-
version.

Derisley v. Cusance. M. 31 G. 3. 75

184. *Per Buller, J.*—It is sufficient to prove the substance of the issue which is here, that the defendant is clothed with such a character, as will make him liable to the covenant, and that was proved by shewing the estate vested in him, either as heir or assignee.—*Per Ashburst.* The plaintiff cannot be supposed to be cognisant of the defendant's title, it was sufficient to alledge that he was assignee, without shewing *quo jure*. *Ib.*

185. The

- Bankruptcy of lessee pleaded.** 4 *Durnford and East.*
 185. The bankruptcy of the lessee is no bar to an action of covenant, (made before the bankruptcy), brought against him for rent due since.
Auriol v. Mills in error. Mich. 31 Geo. 3. Page 6
- Seizure, sale of lands pleaded.** 186. Neither is a seizure and sale of the lease, under writ of *faciatis*, or *elegit* against the lessee. 9
- Forfeiture.** 187. Nor a forfeiture by his attainder.
- Dependent covenants.** 188. A. agreed to sell B. his estate for a certain sum before a particular day, in consideration whereof B. agreed to pay that sum on the day, and on failure to pay 21*l.* it was held that they were dependent covenants, and that A. could not recover the 21*l.* without shewing a conveyance on his part, or a tender of one.
Goodisson v. Nunn. Trin. 32 Geo. 3. 70
- Quiet enjoyment.** 189. In alleging a breach of covenant which was for quiet, it is sufficiently certain to allege, that at the time of the demise to the plaintiff, A. B. had lawful right and title to the premises, and having such lawful right and title, entered, &c. and evicted him, &c. without shewing what title A. B. had, or that he evicted the plaintiff by legal process, &c.
Forster v. Pierson. E. 23 G. 3. 617
- For it implies that the plaintiff was lawfully evicted, and the substance is this, that the person who entered, had a better title than the defendant, and having such title, entered upon the plaintiff.
Ib.
(Hen. Bl. 34.)
190. Alleging that the party having a lawful right and title entered, is equivalent to saying, he entered by lawful right and title.
Ib. 621
- Per Wilson J.*—In the case of *Wadham and Marlow*, it was not stated, that the plaintiff had accepted rent from the assignee as his tenant, but the court decided on the ground that the plaintiff had virtually assented to the assignment.
Ib.
191. All the children C. D. and E. were alive, when A. devised. *Quere.* What estates did they severally take.—
Per Lord Kenyon Ch. J. and Grose. J. They respectively took estates in tail general.
Per,

Darnford and East.

Per Ashburnst and Buller Justices.—They respectively took life estates, with remainders in tail to their respective children.

Griffith v. Harrison. Trin. 32 Geo. 3. Page 737

Hen. Blackstone.

192. The bankruptcy of the defendant cannot be pleaded in bar to an action of covenant for rent, on an express covenant.
Mills v. Auriol, T. 30 G. 3. 433

Express covenant, bankruptcy.

N. B. The judgment in this case was affirmed by the court of K. B. on a writ of error. *Lee 4 Term K. B.* And *per Cur.* tho' the defendant is out of possession, yet he is placed in that situation by his own act. The act of parliament only assigns the interest of the bankrupt in the land, but does not destroy the priority of contract between lessor and lessee; the privity is collateral to the bond. *Ib.*

193. Lord Mansfield in *Wadham v. Marlow*,—It is not necessary there should be an actual acceptance of rent by the lessor, in order to discharge the lessee from the action of debt on the *reddendum*, but any assent is sufficient; the action on the *reddendum* is founded not merely on the terms of the demise, but on the enjoyment of the tenant: what shall be deemed enjoyment has been much agitated, but the tenant cannot destroy the tenancy, without the assent of the lessor.—The bankrupt's estate is vested in the assignees by act of parliament; every man's assent shall be presumed to an act of parliament; it is agreed that if a man be divested by act of law, without his own default, he is discharged;—this is as strong, because though it was his own act originally, on which the assignment was founded, yet the immediate effect produced, is the act of parliament.)

194. Where there are mutual covenants which do not go to the whole consideration, the breach of one cannot be pleaded in bar to an action for the breach of the other.

Mutual breach of one.

Boone v. Eyre. B. R. East. 17 Geo. 3. (in note.) 273

195. But where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. *Ib.*

Mutual condition.

196. Where in articles of agreement under a penalty, there are mutual covenants between A. and B. to do certain acts, and also a covenant which goes to the whole consideration on each side; to an action of debt for the penalty brought

Mutual covenants, debt for penalty.

brought by A. against B. on account of the non-performance of his part, B. may plead in bar a breach by A. of the covenant, which goes to the whole consideration.

The Duke of St. Albans v. Shore. T. 29 G. 3. Page 270.

Covenant to
make good title.

197. A. having covenanted to make a good title to B. at his expence, whether it be a good averment, that A. was capable, ready, and willing to make good title, if B. would have prepared the conveyance.

198. *Quere* also, whether a breach was well assigned, stating that B. did not, nor would accept the title, whether it ought not to have been shewn, that A. tendered a good title to him, which he refused.

With mort-
gagor.

199. Covenants with mortgagor in gross.

Ruffel v. Stoke. 562

(See Mortgage.)

Vern. and Sc.

Quiet enjoy-
ment.

200. In an action against executors in their own right, one covenant for good title and quiet enjoyment against any person or persons whatsoever, contained in an assignment of a lease of the testator by way of mortgage; the declaration must shew a breach by some act of the covenantors.

Noble v. King. 34

Demise to the
King by inden-
ture.

201. In covenant for rent, plaintiff declares on a demise for years to the King by indenture (not stated to have been enrolled) between the lessor and the defendants commissioners of the barracks, on behalf of the King, that the defendants covenanted, that they on behalf of the King would pay the rent, that by virtue thereof the defendants entered, &c. this declaration held to be bad.

361

Several par-
ties join in ex-
pence, &c.

202. The defendant in a deed, together with others severally covenanted to pay the 6th part of the expence that the plaintiff should be at in obtaining a division of certain lands, and in redressing the injuries which all the parties had suffered; the plaintiff avers that he had obtained a division, and redressed the injuries which the defendant had suffered; this held to be bad on special demurrer, for not averring that the plaintiff had redressed the injuries of all the parties.

383

Part of quar-
ters rent.

203. Declaration in covenant for part of a quarter's rent, without shewing that the rest was paid, is bad on special demurrer.

374

Per. and Sc.

204. In covenant by the heir of the assignee of the re-
version, he need not stile himself in the title of his declara-
tion, either assignee, or heir of the assignee.

Heir of assignee,

Noble v. King. Page 603

205. In covenant for rent on a lease for a certain num-
ber of years, if certain persons named lived so long; the
implication of the continuance of the lives from the aver-
ment, that so much was due for six years and an half's rent,
held to be sufficient on general demurrer.

Continuance
of lives, impli-
cation.

224

Spence's Cases at N. P.

206. Covenant in a lease not to assign or under-let, with-
out leave of the landlord in writing, is a fair and usual
covenant.

Not to assign,
&c.

Morgan v. Slaughter. 8

Custom.

Salkeld.

1. **C**USTOM though apparently subsequent to another may be also laid time out of mind, for customs are not coeval. *Lovelace's Case.* Page 203

2. See the difference between general customs, whereof the law takes notice, and special customs which must be pleaded : vide.

Dudfield v. Andrews. 184, 243

2 Lord *Raymond.*

3. To disfranchise for defamatory words, ill.

Queen v. Rogers. 777

4. A custom ought not to be laid in the negative. 869

5. An action cannot be maintained upon a custom, without shewing what the custom is.

Mayor of Winton v. Wilks. 1135

1 *Will.*

6. A custom which is uncertain, unreasonable, and favours of arbitrary power, and tends to make a lord of a manor judge in his own cause, is void. 63

1 *Blackstone.*

7. One custom may be pleaded against another, where both are consistent.

Kinchin v. Knight. M. 23 Geo. 2. 49

8. Custom of merchants must be controlled by adjudged cases.

Edie & Laird v. East India Company. T. 1 Geo. 3. 298

9. Custom of merchants may be proved by the general opinion and understanding of merchants.

Camden Cowley. E. 3 Geo. 3. 417

Burr.

10. No antiquity can give sanction to an usage bad in itself.

Money v. Leach. Page 1767

11. Usage ought not to weigh against principles and clear law, unless in cases where the contrary would be inconvenient, and induce worse effects. *Ib.*

Cowper.

12. "Antient custom" (found in a special verdict), means "immemorial custom."

King v. Gence. 17

13. A custom for the lord of the manor on every death or alienation, to take the second best beast, adjudged to be ill set out for want of stating the particular exceptions to it: exemption of certain tenures, and which exemption was proved at the tryal.

Griffin v. Blandford. 62

Douglas.

14. A custom that tenants, whether by parol or deed, shall have the way going crop, after the expiration of their term, is good in law.

Wigglesworth v. Dallison. 190

15. So is a custom that the inhabitants of a manor shall grind all their corn, grain, and malt, which by them, or any of them, shall be used or spent, ground within the manor at certain mills.

Cort v. Birkbeck. 208, 214

But if it were that they shall grind all their grain whatsoever, by them spent or sold, at certain mills, it would be void. *Ib.* 210

2 *Durnford and East.*

16. A custom for poor and indigent householders living in A. to cut and carry away rotten boughs and branches, in a chose in A. cannot be supported, the description of the persons entitled, being too vague.

Selby v. Robinson. 758

1. *Henry Blackstone.*

17. A custom that a tenant may leave his away going crop in the barns, &c. of the farm, for a certain time after the expiration of the lease, is good.

Beaver v. Delahay and another. Easter 28 Geo. 3. Page 5

Damages.

Damages.

Holt.

1. **I**F upon a demurrer to evidence, the jury do not give any verdict, there shall be a writ of enquiry of damages, but if the jury give a verdict, a defect of assessing damages shall not be supplied by writ of enquiry. Where writ of enquiry.
Sir James Herbert's Case. Page 191

2. The omission of a jury to inquire of damages on a nonsuit in replevin, may be supplied by a writ of enquiry. Writ of enquiry, nonsuit, replevin.
Harcour v. Weeks. 198

3. In some cases, entire damages given shall be intended for those matters only in the declaration, which are actionable. Entire damages only, some matter actionable.
Prince v. Moulton. 193

4. There are three sorts of damages, each of which is a foundation for an action—in fame—in person, and in property.
Savil v. Roberts. 193

5. Costs may be in trespass if voluntary and malicious, (the judge so certifying) though damages under 40s. Costs under 40s.
Dove v. Smith. 194

6. Statutes

Salkeld.

Statutes giving costs.

6. Statutes that give costs, are to be taken strictly.

Dove v. Smith. Page 205

Treble costs.

7. By 2 *W. & M. f. 1. c. 5.*—the Plaintiff shall recover treble costs as well as treble damages. *Id.*

Sum certain by statute, costs.

8. Where a statute gives a sum certain to the party grieved, he shall in consequence have costs, because he had a right of action antecedent to the bringing of the action—otherwise of informer.

Shore v. Madiston. 206

Slander, special damage.

9. In case for slander with special damage, the plaintiff shall have full costs, tho' the damages are under 40s.

Browne v. Gibbens. 206

Assault, battery ;

damages under 40s.

title of lands.

10. In trespass for taking, driving, and wounding his sheep, the plaintiff shall have full costs—for this is out of the stat. 22 & 23 *Car. 2. c. 9.* which enacts, that in all actions of trespass, assault and battery, and other personal actions, where the judge shall not certify the assault sufficient, or that the title of lands came in question, there shall be no more costs than damages where the damages found are under 40s.*Ven v. Philips.* 208

Bail.

11. Bail are only liable to costs of suit, not to damages, by reason of the delay of execution, which are not costs.

Fanshawe v. Morrison. 208*Baron & Feme,* executors.12. Husband and wife declare upon an *indebitatus assumpsit* to them as executors ; on nonsuit, they shall pay costs.*Jenkins v. Plume.* 207

Entering house, assault, aggravation.

13. Trespass for entering an house, and assaulting, &c. the assault, &c. may be laid by way of aggravation of damages.

Newman v. Smith. 642

14. Interest

2 Lord *Raymond*.

14. Interest shall be allowed in the taxation, as damages on a judgment by default in debt on a single bill, but not in debt for rent.

Page 773

15. Interest denied to be taxed against an executor as damages.

774

16. A writ of enquiry in the present *sense* as the declaration held good.

802

17. Damages in covenant for not repairing, must be the sum necessary to put the tenements in repair, though they are damaged since the action brought.

803, 1126

18. Damages for not repairing, ought to be applied to the putting the tenements in repair.

1126

19. A judgment reversed, because the damages as laid in the declaration, &c. extended to a time subsequent to the action brought.

1382

4 *Burr*.

20. The quantum of damages in an action of covenant, may be assessed by the jury, where the precise sum is not the essence of the agreement, but where the precise sum is ascertained, fixed and agreed upon between the contending parties, that very sum so fixed upon by the agreement of the parties, is the measure of the damages, and the jury cannot give less.

2226 to 2236

Cowper.

21. In personal torts, the court will never grant a new trial for excessive damages, unless they are such as manifestly shew the jury to have been actuated by passion, partiality, or prejudice.

Gilbert v. Burtenshaw. 230

22. Bankruptcy

Dougl.

Uncertain
commission
bankruptcy.

22. Bankruptcy is no plea to an action of trespass for mesne profits, because when damages are uncertain, they cannot be proved under a commission of bankruptcy.

Goodtitle v. North. Page 562

Debt.

Debt.

1. **E**XPRESS contracts include three distinct species: debts, covenants and promises. Definition
and nature of
action.

2. The legal acceptation of debt is a sum of money due by certain and express agreement, as by bond, note, especial bargain, &c. where the quantity is fixed and unalterable, and does not depend upon any after calculation to settle it.

3. In actions of debt on simple contract, the plaintiff labours under two difficulties,—1st, defendant may wage his law,—2dly, the plaintiff must recover the whole debt he claims, or nothing at all; for the debt is one single cause of action fixed and determined. To prove a different debt, is to fail in the proof of the contract, but on an action on the case, on what is called an *indebitatus assumpsit*, which is not brought to compel a specific performance of the contract, but to recover damages for the non-performance, the implied *assumpsit*, and consequently the damages for the breach of it, are in their nature indetermined, and if any debt be proved however less than the sum demanded, the law will raise a promise *pro tanto*, and the damages will of course be proportioned to the actual debt. Differs from
indeb. assumpsit.

4. The writ is brought in the *debet & detinet*, when sued by one of the original contracting parties, against the person who incurred the debt, but against an executor for the debt of his testator, the debt not being his own, it is brought in the *detinet* only.

Debet, detinet.

3 *Black. Comm.* 154

5. Any contract whereby a determinate sum of money becomes due to any person, and is not paid, but remains in action merely, is a contract of debt; it is usually divided into debts, record debts by specialty or special contract under seal, and debts by simple contract.

Three species.

2 *Black. Comm.* 464

6. An

Founded on contract.

6. An action of debt is said to be founded upon contract either express or implied, in which the certainty of the sum or duty appears, and therefore the plaintiff is to recover the same *in numero*, and not to be repaired in damages by the jury, as in those actions which found only in damages, *assumpsit, trover, &c.*

2 Bac. Abr. Page 1

Holt.

Rent, lease at will, entry and occupation.

Lease for years.

7. In debt for rent upon a lease at will, plaintiff must shew an occupation, for the rent is only due in respect thereof, and therefore it must appear to the court when the lessee entered and how long he occupied; but in debt for rent on a lease for years, the plaintiff need not set forth an entry or occupation, for though the defendant neither entered nor occupies, he must pay the rent, it being due by the lease or contract.

Bellasis v. Burbrick. 199

For rent, writ of error.

8. Debt for rent lies pending a writ of error on a judgment in ejectment, and bail given to prosecute and answer the mesne profits.

Badger v. Flويد. 199, 200

When ascertained referring to extrinsic matter, *remittitur*.

9. Where the debt arises by the deed, referring to some other matter of fact, plaintiff may remit so much of his demand as to agree with the fact, but if the sum be specified in the deed declared on, it cannot be abridged by any *remittitur* or release. This was an action of debt on simple contract.

Grips v. Ingledew. 200

Obligation.

10. Where a man under his hand and seal, acknowledges himself to be indebted, that is an obligation.

Mawgridge v. Saul. 207, 208

Inquest by default.

11. In debt on a bond, if defendant pleads a release, and issue is thereupon joined, and at the trial he makes default, plaintiff may pray judgment, and the inquest need not be taken by default.

Staple v. Haydon. 217

Judgment, escape.

12. Debt lies on a judgment notwithstanding an escape, the party being permitted to escape, the plaintiff not consenting.

Buxton v. Home. 279

Nil debet, statute of limitation.

13. In debt for rent on *nil debet* pleaded, the statute of limitations may be given in evidence, for the statute has made it no debt at the time of the plea pleaded.

Anonymous. 283

(Vide 1 Lord Raymond, 155.)

14. On

Holt.

14. On debt for rent, defendant pleaded levied by distress, *et sic nil debet*, a release or payment is good evidence. For rent, release, payment.
Galloway v. Sujack. Page 299

15. Whether a debt be released or extinguished, where the obligor makes the obligee his executor—*per Holt*, though it is a discharge of the action, the debt is assets, and the making him executor does not amount to a legacy, but to payment and a release. Obligor, executor.
Wankford v. Wankford. 311

16. In debt a man may plead a release, or give it in evidence upon *nil debet*. Release in evidence.
Hatton v. Morse. 395

Salk.

17. Plaintiff declared in debt, on an agreement to pay him 100l. per ann. for his trouble in collecting rents, and brought his action for 75l. for three quarters salary. Verdict for plaintiff, but judges reversed, for it being an entire contract it cannot be apportioned. Entire contract, apportionment.
Countess of Plymouth v. Throgmorton. 65
 (Vide *M^r Quillin v. Cox.* 1. *H. Black.* 249. and *Strange* 1089, and *Colley v. Haller.* 2 *Vent.*)

18. Debt lies for sheriffs fees of executing an *elegit*. Sheriff's fees.
Jayson v. Rasb. 209

19. In debt for rent on a lease at will, occupation must be shewn. *Bellasis v. Burbrick.* 1b.
 (Vide *Holt.*)

20. (If lessee for years let for a lesser term, reserving a rent, in an action of debt for the rent, he may set forth, that at the time of the lease he was possessed of the land, *pro termino diversorum annorum*, &c. and being so possessed, demised to the defendant, &c. without shewing the beginning of his term, and how derived, for it is but inducement to the action. Rent, lease for years. Commencement of term.
Adams v. Cross. 2 *Vent.*)

21. An *indebitatus assumpsit* will lie in no case but where debt lies. *Indebitatus assumpsit.*

23. *Hard's Case.*

22. In general where the same hand is to receive that ought to pay, it is an extinguishment of the debt. Extinguishment.
 305

23. Yet

Salkeld.

23. Yet if the executor of one of the obligors having no assets, is made executor to obligee, it is no extinguishment, —if obligee takes obligor to husband, it is an extinguishment, otherwise if executrix of obligee takes obligor to husband.

Wankford v. Wankford. Page 305

Wager.

1 Lord Raymond.

24. Debt or *indebitatus assumpsit* will not lie on a wager.

Bovey v. Castleman. 69

Penalty by statute.

25. A person to whom a penalty is given by a statute may have debt for it.

College of Physicians v. Salmon. 682

Deed refers to fact, *remittitur*.

2 Lord Raymond.

26. The plaintiff has election to sue for the penalty of a penal bill, or for the money covenanted to be paid.

Ingledeu v. Cripps. 814

Remittit.

27. The bill penal in this case, referred to an agreement or contract for sale of certain articles. *Per Holt*, where the money is certain and entire on the face of the contract, the demand of more than is due is ill, and cannot be aided by a *remittitur*, but where the money recoverable is composed of several persons, there if plaintiff demand more than is due, he may enter a *remittit* for the overplus, for there he ought to recover that which he can prove to be due, and not according to his demand. *Ib.*

28. Plaintiff in debt for rent demanded 8l. more than was due, and had leave to enter a *remittit*, 5 *Mod.* 202, 212, 214, and in 1 *Roll. A.* 785. *Barber v. Pomeroy.* *Stile* 175. cited, where *remittit* entered in like manner,—in *nil deket* to debt for rent, the jury is to try not only whether the whole, but whether any part is due, therefore they may find against defendant for a part. *Loft.* 276.

(*Vide* 4 *Bac. Abr.* 371.)

Debt or covenant.

29. On a covenant to pay money for goods sold, the plaintiff may have debt or covenant at his election. *Ib.*

Debt for rent on bond, *nil debet*

30. To debt for rent reserved by indenture, defendant may plead *nil debet*, not to debt on bond, for in the former case the specialty is but inducement to the action, and matter of fact the foundation of it; in the latter the deed is the foundation, and the fact is but inducement.

Warren v. Consett. 1500

31. Interest

2 Lord *Raymond*.

31. Interest shall be allowed in the taxation as damages on a judgment by default in debt on a single bill, but not in debt for rent, for rent does not carry interest.

Lapiere v. Duke of St. Albans. Page 773

Strange.

32. Where money is lent on a pledge, it will not deprive the lender against the person of the borrower, unless there be a special agreement to stand to the pledge only.

South Sea Com. v. Dancombe. 919

33. Though a bond is taken for a simple contract debt, not if it is after an act of bankruptcy, the simple contract is yet extinguished so far as to deprive the creditor of petitioning for a commission.

Ambrose v. Clendon. 1042

34. Debt lies on a covenant in a deed, and the jury must give a verdict as to the whole demand; the action here was brought for 500l. the jury found a verdict for 357l. but said nothing as to the residue.

Hooper v. Shepherd. 1089

35. Debt on bond staid on payment of principal, interest, and costs, without regarding the costs of a former action.

Sifney v. Newinson. 699

36. A set-off reducing the demand under 40, does not affect the jurisdiction—the real demand was above 40, and the plaintiff could not tell whether any thing was to be set off.

Pitts v. Carpenter. 1191

37. Statute of limitations replied to a set-off.

Remington v. Stephens. 1271

38. When the payer does not apply his payment, the receiver may apply it, but he must not apply it to an uncertain demand, as to a debt from a testator.

Goddard v. Cox. 1194

39. May be brought for rent by deed, either where the deed was made, or where the land lies, against the lessee; otherwise against the assignee, who is chargeable only on the priority of estate.

Patterson v. Scott. 776

40. Duress of goods will not be sufficient to avoid a bond.

Summer v. Ferryman. Cited. 917

(1 Roll. Abr. 687. contra.)

41. If

41. If a man menace me, unless I make him a bond for 40l. and I tell him I will not do it, but will give him a bond for 20l.—the court will not expound this bond to be a voluntary one, for *non videtur consensum retinuisse qui ex prescripto minantis aliquid mutavit.*

Bacon's Maxims. Page 22

1 *Wils.*

Payment to
third person.

42. Debt on bond, with condition for payment of money to A. B. a third person. A. B. declares, that plaintiff owes him nothing, and upon proof thereof verdict for defendant, such declaration is proper evidence, as A. B. is to be considered as the real plaintiff.

Hanson v. Parker. 257

2 *Wils.*

Award.

43. Debt upon an award, *nil debet* pleaded positively in the arbitrators, not allowed to be given in evidence, for it may be wholly unknown to the plaintiff.

Wills v. Maccarmick. 148

Bail-bond.

44. If sheriff takes bail for more than the sum sworn to, and marked on the writ, the bond is not therefore void, though sheriff may be punished.

Norden v. Horsley. 69

45. (By *stat. 12 Geo. 1. c. 29.*—No person shall be held to special bail on any process, issuing out of any superior court, where the cause of action shall not amount to 10l. or upwards, and in such case affidavits shall be made of the cause of action, and the sum specified in such affidavits shall be endorsed on the back of the writ or process, for which sum so endorsed, the sheriff shall take bail, and for no more.

46. (Vide 1 *D. & E.* 122, 418. 2 *D. & E.* 560, 559. Debt or recognizance against bail. Vide 2 *Str.* 915, 917. 1 *Lord Raym.* 720. 2 *Black.* 922. 2 *Wils.* 67, 269. 4 *Burr.* 2134. *Dougl.* 45. 1 *Str.* 419, 443, 526. 2 *D. & E.* 757. 3 *D. & E.* 79. Debt on bail-bond, 1 *Burr.* 330. 1 *Wils.* 180. 1 *Str.* 444.)

Estoppel.

47. Defendant is estopped by his deed to plead any thing *dehors* to avoid it—i. e. any thing contrary to his deed, but he may plead that a bond was given to compound a prosecution for perjury; for this plea admits and avoids it, but it

it should conclude, that therefore the bond was void, not bribed with a *non est factum*.

Collins v. Blantern. Page 344

1 *Blackstone.*

48. Action for corrupt bribery will lie, though the person bribed does not vote according to the bribe.

Sulston v. Norton. M. 2 Geo. 2. 317

49. Bribery by *loan* is but colour, and is really bribery by gift. *Ib.*

50. Action on the stat. of bribery, need not state all the parties for whom the bribe was given, nor need it be proved, that those parties were candidates, nor need the voters right of voting be proved.

Combe qui tam v. Pitt. M. 5 Geo. 3. 523

51. On the stat. of bribery, making an affidavit is a sufficient discovery to indemnify the discoverer, but a conviction must follow, and it will be good, though the witness himself be convicted of bribery between the discovery and conviction—a naked verdict only without a judgment is not a conviction.

Sutton v. Bishop. H. 9 Geo. 3. 665, 666

3 *Wilson.*

52. Action of debt on the stat. 12 Ann. c. 16. of usury. *Qui tam*, for treble the money—one lends 100l. and takes 6l. 5s. 6d. usury, for the interest thereof, for three months by way of advance one year, at the time of lending, the penalty is that instant incurred, requisite to support the action. and the action must be brought within one year after *that* time.

Lloyd qui tam v. Williams. 250

Per De Grey, Ch. J.—To constitute the offence for which this action is brought, to recover treble the value of the money lent, these three things must concur—1st. A contract between the parties—2d. Monies or other things lent—3dly. Above 5l. *per cent. per annum*, received by the lender for the forbearance—whenever these three matters concur, then the offence is committed; no time is mentioned with respect to payment of the principal money lent, the principal money may never be paid, and yet the offence be committed—every receipt of above 5l. *per cent. per annum* interest, would be an offence, for which an action *quitam* for treble the value of the money lent would lie, and no shift or contrivance whatsoever, can take it out of the statute of queen Ann. In this case the sum of 100l. was actually lent by

by the defendant to H. who received the whole 100l. with the one hand, and immediately paid the defendant 6l. 5s. od. for three months interest by way of advance with the other hand, so that the offence was completely committed on the 31st of March, 1769, which was more than a year before the present action was brought, and therefore the plaintiff cannot recover.

Lloyd qui tam v. Williams. Page 250
(& vide *Murray v. Harding*, 3. Wils. 390.
1 Wils. 286. & 1 Atk. 304.)

2 *Blackstone.*

Usurious
contract.

53. Usurious contract to receive exorbitant interest by way of advance, is complete on the payment of the advanced premium, and must be prosecuted within a year after.

Ib. 793

54. *Per Cur.*—Interest may as lawfully be received beforehand, for forbearing, as after the term is expired, for having forborn, and it shall not be reckoned as merely a loan of the balance; but even so, the plaintiff could not recover on this action which was brought for 300l. as the treble of 100l. the sum alledged to be lent. *Ib.*

Apportioned.

55. In debt on a *mutuatus* for 200l. and *nil debet*, pleaded, the jury found a verdict for 100l. and *nil debet*; as to the rest, it was moved to enter up a nonsuit on the ground, that debt being an entire thing, part of the sum could not be so recovered, but the court refused to set the nonsuit aside, and the plaintiff had judgment.

Aylett v. Lowe. 1221

1 *Burr.*

Account stated,
extinguishment.

56. An account stated is no extinguishment of the original debt, and therefore it is no plea in bar to a demand of a debt of the same degree, neither can a note of hand be pleaded in bar to an action upon simple contract, though a bond may, because it extinguishes the debt, but one bond cannot be pleaded to another.

Roades v. Barnes. 9

On award,
arbitration
bond.

57. In an action of debt brought upon the award itself, the plaintiff need shew forth nothing more than is necessary to support his claim, and entitle him to the thing demanded, all else must come on the defendant's part; but it is quite otherwise, if the plaintiff bring his action of debt upon the
the

the arbitration bond in that case, he must set forth the whole award.

Perry v. Nicholson. Page 280, 281, 282

3 *Burr.*

58. 1st. The stat. of 2 G. 2. c. 24. for the more effectual preventing bribery and corruption therein, section 7. discussed and explained. 1235

59. 2dly. Giving a bribe to vote, or to forbear voting, is an offence within this act and clause, although the voter do not comply with his engagement. *Ib.*

60. To support a declaration in debt, on 2 G. 2. c. 24. §. 7. for bribery at an election to parliament, charging, that Mr. *L.* and Lord *E.* had declared themselves candidates, and whilst they were candidates, the defendant bribed one *W.* who had a right to vote for them, Mr. *L.* and Lord *E.* three objections were made, and over-ruled. 1586 to 1591

61. 1st. It was not sufficiently proved, that *W.* had a right to vote at the time when the bribe was given.—
N. B. It was proved, that he actually voted. *Ib.*

62. 2dly. Nor any evidence that Lord *E.* was at that time a declared candidate. *Ib.*

63. 3dly. Nor any evidence that the bribe was given to vote for Mr. *L.* and Lord *Egmont*, “for the evidence only proved that it was given to vote for Mr. *L.* and his friend,” not particularly who that friend was. *Ib.*

64. The court held the material and substantial charge to be sufficiently charged. *Ib.*

4 *Burr.*

65. An action of debt cannot be maintained on a judgment, unless it still remains altogether unsatisfied—not if it be satisfied in part. Debt on judgment.

Vigers v. Aldrick. 2483
(Vide *Jacques v. Wisby.* 1 D. & E. 557.)

66. (In general in declaring on bonds, or matters of record, the declaration should always conclude *ad damnum* of the plaintiff, but in debt for rent with a *per quod actio accrevit*; for in the first case the debt arises merely from the bond or judgment, but in the latter from something extrinsic, viz. the enjoyment of the land.

Espinasse, N. P. Page 215)

Usury.

Cowp.

67. One sells goods at three months credit, but stipulates in case the money is unpaid, that the vendee shall allow him an halfpenny an ounce *per* month, till the debt is discharged—this allowance was according to an usage in that particular branch of trade, but above the legal rate interest—the contract being a *bona fide* sale is not usurious; otherwise, if it had been merely colourable to cover a loan, and evade the statute.

Floyer v. Edwards. 112

(Vide *Gray v. Fowler.* *H. Black.* 462.)

Usury.

68. Where more than 5 *per cent.* be taken, if the substance of the contract be a borrowing and lending, a slight colourable contingency only will not take it out of the statute of usury.

Richards qui tam v. Brown. 770

For rent,
riens in arriere.

69. *Riens in arriere* is a good plea in debt for rent; it is the same as if he had said *nil debit.*

Warner v. Theobald. 588

(In *1 Brownl.* 19. such plea was held bad in covenant for rent.)

Douglas.

Usury.

70. The lender of money compels the borrower to take goods at a price considerably above their value in the form of a sale, which are sold by a broker at the intervention of the lender; if the security given is made payable at a future day for a sum exceeding the value of the goods, and 5 *per cent.* interest—this is an usurious loan, and the security is void—a bill of exchange given upon an usurious consideration is void, even in the hands of an indorsee for valuable consideration, without notice of the usury.

Lowe v. Waller. 708.

(Vide *Morrisset v. King.* *2 Burr.* 891.)

71. An

Doug!

71. An action of debt will lie on a foreign judgment, and without stating in the declaration, or proving the ground of the judgment, but it is not in the nature of a record, but of a simple contract debt. Foreign judgment.

Walker v. Witter. Page 4 to 7

72. *Per J. Buller.*—All the old cases shew, that where-
ever *indebitatus assumpsit* is maintainable, debt also is. *-Indebitatus assumpsit.*
(Vide 2 Burr. 1008.) *Ib.*

73. Instances of actions of debt, in which it is not necessary to prove the exact sum laid in the declaration.—Debt may be brought, said Lord *Mansfield*, for a sum capable of being ascertained, though not ascertained at the time of the action brought. Where exact sum not necessary, &c.
Ib. 6, 704

74. In debt upon a bond, if the defendant's admission of the debt is proved, and the subscribing witness cannot be produced, it will be sufficient to prove the defendant's hand-writing. On bond, hand-writing of witness.

Coghlan v. Williamson. 90

75. In debt on bond for payment of rent, the bond is only a security to the amount of the penalty. Penalty, damages.
White v. Sealy. 49
(Vide 2 D. & E. 388.)

76. Debt will lie on assessment against witness for non-attendance by the court, out of which the process issues. Assessments on witness.
Pearson v. Hles. 540

1 *Durnford and East.*

77. Bankruptcy is a plea to an action of debt, on an implied covenant in law—the *reddendum* in a lease. On covenant, bankruptcy pleaded.
Wadham v. Marlowe, 91. (cited.)

78. When costs are taxed, they become a debt vested. Costs taxed.

The King v. R. Chamberlayne. 103

79. *Qu.*—Whether not guilty, may not be pleaded to an action of debt on a penal statute. Penal stat. not guilty.
Coppin qui tam v. Carter. 462

1 *Durnford and East.*

80. Debt on penal stat. for bribery at elections.—*Vide* 4 *Burr.* 2273. 1 *Bl.* 664. 4 *Burr.* 2267. 3 *Burr.* 1586. and *D. & E.* 235.

Not guilty,
devastavit.

81. Upon a *devastavit* against executors, not guilty may be pleaded as well as *nil debet.* Page 460

Bond to a
house, other
partners added.

82. Where a bond was not a personal obligation, as where it was made to the house, viz. for faithful service in the counting-house and shop, and the then partners in the house, to whom the obligation had been made, took in another partner—the bond was held still to remain in force, and the obligees recovered on it.

Barclay v. Lucas. (cited.) 298

2 *Durnford and East.*

Escape, da-
mages, sum in
writ.

83. In debt against a sheriff or gaoler for an escape, the jury cannot give a less sum than the creditor would have recovered against the prisoner, namely, the sum endorsed on the writ, and the legal fees of execution.

Bonafous v. Walker. 126

Re-taking, vo-
luntary escape.

84. A voluntary return of a prisoner after an escape, before action brought, is equal to a re-taking on a fresh pursuit, but it must be pleaded; under a count for a voluntary escape, the plaintiff may give evidence of a negligent escape, and the plaintiff may plead a re-taking on a fresh pursuit to such a count, without traversing the voluntary escape. *Id.*

Damages be-
yond penalty.

85. The jury may find damages more than the amount of the penalty, contrary to the case of *White v. Sealy.* *Dougl.* 49. in which it is decided, that in debt on a bond, no more is recoverable than the penalty.

Lord Lonsdale v. Church. 388

Verdict as to
part, *nil debet*,
residue.

86. (As a sum certain is always claimed, the verdict must go to the whole of it, that is, if the jury find part to be due, they must find *nil debet* to the rest.

Co. Lit. 227. a.)

Detention.

87. The jury besides finding the debt, ought to give damages for the detention, which is usually one shilling, though under particular circumstances it may be more, as suppose the principal and interest due on a bond, exceed the penalty, the jury ought to give the residue in damages as well as in debt on a single bill.

Buller's N. P.

88. In

Durnford and East.

88. In declaring in debt on simple contract, for goods sold and delivered, it is sufficient to state generally, that the defendant at *Westminster*, in the county of *Middlesex*, was indebted to the plaintiff in the sum of £. for divers goods, without alledging an express contract, and place where such contract was made, for the words sold and delivered, imply a contract, and the venue laid in the beginning of the declaration, must imply that the contract was made there.

On simple contract.

Emery v. Fell. Page 28

Durnford and East.

89. Where in an arbitration bond, the time was limited for the arbitrator to make his award, and the declaration stated, that such time was afterwards enlarged by mutual consent—it was held that no action could be maintained on the bond to recover the penalty, for not performing the award made after the time first limited.

Arbitration bond.

E. 29 Geo. 3. (in note.) 592 b.

Hen. Blackstone.

90. In debt on a judgment, the plaintiff in his declaration states, that in *Trinity term*, 1787, he had recovered by a judgment of the court of K. B. 42l. for his costs in the defence of an action brought by the defendant in that court against him the said plaintiff; on *nul tiel record* being pleaded, and the record produced it appeared, that the judgment was of *Easter term*, 1788, and that the action was brought by the defendant against the plaintiff and another person, both of which variances were held fatal.

Rastall v. Straton. 49

(*Vide Salk. 659, 565, 654.*)

91. In an action of debt on a simple contract, the declaration is good, though it specify a less sum in the several counts than is demanded in the recital of the writ, and yet assigns as a breach the non-payment of the sum demanded in the writ.

Simple contract.

M^cQuillin v. Cox. *Trin. 29 Geo. 3.* 249

92. In such action the plaintiff may prove and recover a less sum than is stated to be due.

Less sum than stated.

93. An action of debt on a promissory note, payable by installments, will not lie, 'till the last day of payment be past.

On promissory note, installments.

Rudder v. Price. *Hil. 31 Geo. 2.* 547

94. *Per*

Hen. Blackstone.

94. *Per Lord Loughborough.*—In ancient times ~~the~~ was the common action for goods sold and delivered—the opinion which was erroneously entertained, that in an action of debt on a simple contract, the whole sum must be proved, has been some time since corrected: the note in question is for payment of a sum certain at different times, and being considered as a debt for the amount of that sum, no action of debt can be maintained upon it, till all the days of payment be past—where the demand is for the payment of a sum of money, it is a technical fiction to call the sum recovered *damages*, it is the specifick debt, and the jury give the specifick thing demanded.

Rudder v. Price. Hil. 31 Geo. 2. Page 547

95. Debt will lie for interest of money. *Semb. N.*

96. On a writ in debt for one thousand and sixty-six pounds, plaintiff declared for one thousand pounds borrowed by defendant of the plaintiff, and in a second count for sixty-six pounds for interest of certain other sum of money lent by plaintiff to defendant, pleaded in abatement of the writ, “that the said sum of money in the said writ mentioned, and thereby supposed to be borrowed from the plaintiff,” was borrowed by defendant and others, and not by defendant separately; on demurrer, because, this plea only answered one of the causes of action, that mentioned in the first count, the court held the plead bad.

Herries v. Jamieson. E. 34 G. 3. 5 Durnford & East. 553

2 *Hen. Blackstone.*

Bribery.

97. In an action for bribery on the stat. 2 Geo. 2. c. 24. it is not a material variance if the declaration state the precept to have issued to the bailiffs of the borough, but the precept produced in evidence is directed to the bailiff,

Warre v. Harbin. 113

Escape.

98. An action of debt will lie against a gaoler for the escape of a prisoner in execution, though the escape were without the knowledge of and without any fault whatever on the part of the gaoler, who in such case can avail himself of nothing but the act of God, or the King's enemies, as an excuse.

Alsept v. Eyles. 108

99. Debt

Ver. & Scr.

99. Debt on bond conditioned for performance of covenants, plaintiff assigns a breach in his replication, and gets a verdict without any assessment of damages, he may enter judgment for the penalty.

Bond, performance of covenants, judgment for penalty.

Wheeler v. Bowerman.

Page 238

Deed.

Deed.

Definition
and nature of.

Requisites.

1. **A** DEED is a writing sealed and delivered by the parties — There ought regularly to be as many copies as there are parties; that part which is executed by the grantor, is usually called the original, and the rest are counter parts: though of late it is more frequent for all the parties to execute every part, which renders them all originals. The requisites to make a good deed are parties able to contract, a sufficient consideration, as money or natural affection; it must be written or printed on paper or parchment, there must be formal and orderly parts, as the premises, (setting forth the names of the parties, &c. &c.) the *habendum* (the office of which is properly to determine what estate or interest is granted by the deed, though this is sometimes performed in the premises, in which case the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises, for if the *habendum* is repugnant to the premises it is void). The *tenendum* is now of little use, it formerly denoted by what tenure *per servitium militare*, &c. which are all reduced now to free and common socage. — The *reddendum* which usually consists of money, the reservations must be to the grantors or some of them, not to a stranger. *Warranty* is superseded by covenants for heirs or executors. Lastly, the date, which though impossible, if the delivery can be proved, it is sufficient: if the party be blind or illiterate, the deed must be read, — it is requisite the party should seal, and in most cases I apprehend sign it. The statute of frauds expressly directs signing in all grants of lands. — Another requisite is delivery, which may be either absolute to the grantee or to a third person to hold, till some conditions are performed on the part of the grantee, in which case it is called an *escrow*; the last requisite is attestation, though this is rather for preserving the evidence than constituting the essence of a deed.

2 *Black. Comm.* Page 295, 307

2. The office of a *habendum* in a deed is, properly to determine what estate or interest is granted by the deed, though this may be performed in the premises, in which
case

the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the premises.

2 Bl. Comm. Page 2, 298

lets.

3. Deeds are to be pleaded according to their legal operation, and not according to the words of them. As if tenant for life grant his estate to him in reversion, this is to be pleaded as a surrender. Legal operation.

Baker v. Lane. 211

4. One party to a deed cannot covenant with another who is no party, but a mere stranger to it; but one who is not a party to a deed may covenant with another that is a party, and thereby be bound by sealing the deed. Person not a party, bound by sealing.

Salter v. Kidgley. 210

5. Where the delivery of a bond was after the date thereof, the plaintiff must declare generally of a bond, dated of such a day, but with a *primo deliber.* on such a day, for otherwise it shall be intended to be delivered on the day it is dated. Delivery after date.

Crowwell v. Dresdale. 122

(Vide Cro. E. 606, 773. 2 Lev. 117. 3 Lev. 266. Runn. Eject. 95, 98.)

6. If a deed has no date, or an impossible date, the plaintiff may declare that the defendant by his deed on such a day and year did such a thing, and upon *oyer* there will be no variance; but if you say that the defendant by his deed of such a date, or bearing date so and so, and on *oyer* the deed has no date or an impossible one, it will be a variance. No date, impossible date. Variance.

Anonymous. 211

7. Every deed has a date, either express or implied; the implied or date in law is, the time of delivery. Date express, implied.

Armote v. Bream. 212

8. Date is no material part of a deed, therefore if a man declares on a lease dated 14th December, to begin from Christmas, for three years, and produces a lease dated, sealed and delivered the 13th of December, to begin from Christmas for three years, it is evidence to support the lease alledged.

Gilb. E. 215

(Vide Cro. J. 136.)

9. When

Holt.

Profert.

9. When deeds are pleaded with a *profert*, they are intended in the custody of the court immediately.

Anonymous. Page 211, 212

Escrow,
second delivery.

10. Where a deed is delivered as an *escrow*, to become the parties deed on his doing a certain thing, a second delivery is requisite.

Busbel v. Pasmore. 213

Non est factum,
proof.

11. General plea of *non est factum*, turns the proof of what is necessary to make it his deed on the plaintiff. *Ib.*

Kept in court.

12. Deeds shall be kept in court, and not cancelled on suspicion of forgery, because the judgment might be reversed by writ of error.

Fitch v. Wells. 213

Living witness denies execution, hand-writing.

13. Deed proved by comparing the hand of a dead witness, where the living witness in court admitted his hand-writing subscribed, but denied he saw the deed executed.

Blurton v. Toon. 291

Lost, existence.

14. When a deed is lost or burned, a copy or counterpart may be proved, or the contents given in evidence; but then it must be proved there was such a deed executed.

The King v. Sir T. Calpepper. 293

Old deed.

15. An old deed is good evidence, without any witness to prove the execution.

Lynch v. Clarke. 293

16. (The *inspecimus* of the inrollment, and not of the deed itself, may be given in evidence, if it be an ancient deed. By *Cb. J. Roll. Style.* 445.)

17. (Where the interest vests by livery, the deed may be pleaded or given in evidence, though the seal be taken off; otherwise of things that lie in grant.

Gilb. 107, 108.)

18. (Where possession has gone with any deed many years, a very old copy of such deed may be given in evidence, with proof also of the original, *Gilb.* 97. If possession has not gone along with a deed, some account is to be given of it, for then the presumption in favour of it fails. *Ib.* 100.

—So

—So if razed or interlined, the presumption fails, and its credit ought to be restored by proof of the execution.

Bulter, N. P. Page 225

Holt.

19. (Old deeds are read on the presumption that the witnesses are dead; but if it appears that they are living, they must be called. *Vin. Evid. 2.* Where there are two witnesses to a deed, who are dead, if there be full evidence to prove one of their hands, and any evidence that endeavours have been made use of to prove the other's hand, it is sufficient, without proving the hand of the executing party.

(*Comb. 248. Tr. per P. 433. 11 Vin. 224. 3 Com. 182. 1 Atk. 49. and vide Lord Raymond 734. Vin. Evid. 48. Str. 833.*)

20. (Cases where a copy or secondary evidence given deed, being lost or suppressed, &c. *2 Atk. 72. 1 Vern. 389. 1 Mod. 4, 94. Gilb. 71. 2 Keb. 544. 3 Keb. 1. 1 Lord Raymond, 731. Clay. 15.*—Recital where a person is party or privy to the original lease. *Vide Salk. 285, 286, 287. 6 Mod. 44, 45. 1 Lev. 122. 2 Mod. 115. 4 Co. 74. 6 Roll. Abr. 872. Telo. 226. 1 Brown 117. 2 Bulst. 19. 2 Lev. 11. 2 Roll. 678. Hard. 323. Tr. per R. 349.*)

21. The witness to the delivery of a deed being subpoenaed, did not appear; but an indorsement by the party, owning it to be his deed, held good evidence. *Proof by admission.*

Dillon v. Crawly. 299

22. A counter-part of a deed without other circumstances, is not sufficient evidence, unless in case of a fine. *Counterpart.*

Anonymous. 301

Salkeld.

23. The day of the delivery of the deed, is the day of the date, though there is no date set forth. *Delivery, date.*

Armist v. Breame. 76

24. If a deed bear date one day, and be really delivered another, it was really dated when delivered. *Id. Ib.*

25. But as to the clause *gerens dat. se*, it seems otherwise, and differs from a *datu* or *cujus dat.*—the making is the date. *Gerens actum.*

Cromwell v. Grunsden. 463

26. An impossible date is no date, and the plaintiff must declare of the time of making. *Impossible date. Ib.*

27. A

*Salkeld.**A datu.*

27. A lease to commence *a datu*, includes the day of the date,—*per three contra Treby*.

Hatbs v. Asb. Page 413

Anno domini.

28. A deed dated in figures, without *anno domini*, &c. is good.

Holman v. Borough. 658

lb.

29. Plaintiff declared of a deed bearing date in the year of our Lord 1701, and in the year of the king, &c. Upon *oyer*, the year of the king was wanting, but it was held no variance, for it was implicitly in the deed. . . . *lb.*

In first person,
signing, sealing,
party.

30. When a deed runs in the first person, signing and sealing makes A. a party, though not named therein.

Nurse v. Frampton. 214

Notice be-
comes impossi-
ble.

31. Where one is bound by deed to do an act, of which he is to give notice, though the notice is dispensed with by becoming impossible, yet the act must be done. *lb.*

Delivery to
the use of third
person.

32. An obligation delivered by A. to C. to the use of B. is a deed till B. refuses.

Wankford v. Wankford. 301

Enrolment.

33. A deed may be enrolled without the examination of the party, upon proof by witness of its delivery.

Taylor v. Jones. 389

Id.

34. The party died before acknowledgment, yet the deed was enrolled. *lb.*

Id.

35. And where two are parties, acknowledgment by one binds the other. *lb.*

1 Lord *Raymond*.

Parties not
named, sign.

36. A deed is good, not naming the parties, if they sign.

Nurse v. Frampton. 28

Delivery.

Primo deliberatum, by whom it may be pleaded, and how.

Pullein v. Benson. 354, 356, 357

Stranger, par-
ty.

37. *Per Holt*.—The date of a deed, is the delivery of the deed, and shall always be taken so, if the plaintiff does not shew the contrary in his declaration, and then if the defendant varies from it in his plea, he ought to take a traverse if the time of the delivery be material,—a stranger to the deed

deed may plead *non concessit*, and not *non est factum*; *contra* of him who is party to the deed,—a stranger to a deed may aver delivery of the deed before the date, but a party cannot.

Pullein v. Benson. Page 354, 356, 357

38. A deed cannot be avoided by *durejs* of imprisonment of a stranger. *Durca,*
Ib. 357

2 Lord *Raymond*.

39. A deed is declared upon, as bearing date 13 *Will.* 3, and upon *oyer*, it appears to be dated 1701, this variance was pleaded in abatement, and over-ruled.

Holman v. Burrow. 791—795

40. The words *anno domini*, omitted, and supplied by intendment. *Ib.*

41. A writing required by a statute, &c. to be signed and sealed, shall not be intended a deed, nor need be pleaded with *profert in curia*: Delivery being the essence of a deed. *Matter under seal, yet no deed.*
763, 967

42. The omission of *figillatum* in the *profert* of a deed, cured by pleading over, or by verdict. *Sealing.*
Vivian v. Champion. 1126

43. *Scriptum* does not import a deed, for it may be writing, and not by deed, and if it were so, notwithstanding the writing, it is but a parole contract.
Benns v. Parre. 1206

44. On covenant upon a writing made at *Westminster*, &c. the defendants pray *oyer*, and plead over, and the writing upon the *oyer* concludes, In witness whereof we have set our hands and seals. *Sealing, essential.*

45. Yet that does not shew the deed was actually sealed, for sealing is a fact which ought to be positively averred, or else something should be in the declaration, which necessarily imports it was sealed.—Judgment for the plaintiff reversed, because the writing does not appear to be a deed.
Moore v. Jones. 1536

46. (To prove the sealing and delivery of a deed, not knowing the parties that did it, is not good evidence; but if the witness knows the party, upon sight of him, it is good enough. *Tr. per P.* 172.)

47. Where

*Strange.**Oyer.*

47. Where a deed is pleaded, the other party cannot alledge there is other matter contained in the deed, but must set it forth upon *oyer*.

Stibbs v. Clough.

Page 227

Oyer, deed lost.

48. *Oyer* not to be dispensed with, though the deed is lost.

Soresby v. Sparrow.

1186

(Vide 3 D. & E. 151.)

In hand of third person.

49. When a deed is in the hands of a third person, the court will oblige him to give *oyer*, and produce it.

White v. Earl of Montgomery.

1198

Oyer.

50. A party who has had *oyer*, is not obliged to set it forth in his plea.

The Weavers Company v. Forrest.

1241.

Bargain and sale, consideration.

51. Pleading a bargain and sale, without shewing it to be for a valuable consideration, will be ill upon demurrer, but is cured by verdict, or taking issue on a collateral fact.

Sargent v. Reed.

1229

Sealing.

52. *Indentura facta inter A. et B.* imports sealing by both.

Atkinson v. Coatsworth.

512

Attorney, principal.

53. An attorney must execute a deed in the name of his principal.

Frontin v. Small.

705

Oyer, deed in hands of third person.

54. Where a bond is in the hands of a third person, the court will oblige him to give *oyer*, and produce it.

White v. Earl of Montgomery.

1198

2 *Wilson.**Surrender of a term.*

55. Surrender of a term, may be by writing, without deed or stamp. — 26.

Corrupt agreement debors.

56. That a deed was executed upon a corrupt agreement *debors* the deed, may be averred in pleading.

Collins v. Blantern.

341

Matter debors.

57. In this case it was attempted to be supported, that the defendant was estopped by his deed to plead any thing *debors* to avoid it, (as here, that it was given to compound a prosecution for perjury;) the court held that the *estoppel* only went to prevent the party from pleading any thing contrary to the

the

the deed, but this plea admitted and avoided it, and in this case the plea should conclude, "that therefore the bond was void," not with a *non est factum*.

Collins v. Blantern. Page 341

Blackstone.

58. Debt on a bond of thirty years standing, the plaintiff insisted on reading it, without proof of its execution. Lord Mansfield held, that there should be some proof of its authenticity, as by payment of interest, or by producing the attesting witnesses, if living, and he being proved to be living, and not produced, the plaintiff was non-suit.^d

Forbes v. Wale. 538

1 *Burrow.*

59. Deeds, especially such as execute mutual agreements, for valuable considerations, ought to be construed liberally, and agreeable to the obvious and apparent intention of the parties.

Wright v. Cartwright. 285, 286

60. Priority of execution of deeds of equal date is a fact, but if not found, the court may judge of it by circumstances, and internal evidence—they may even make a presumption in support of the clear intention of the parties.

Taylor v. Horde. 106, 107

3 *Burrow.*

61. There is an important distinction between the deeds of *femes covert* and the deeds of infants; those of *femes covert* are void, and *non est factum* may be pleaded to them, but those of infants are only voidable, and the infancy must be specially pleaded, and that plea avoids it by relation back to the delivery—the reason of this is, because it has an operation from the delivery, and not because it has the form of a deed.

Zouch v. Parsons. 1805

4 *Burr.*

62. Want of notice to produce a deed, is no objection, when the deed is in court.—*Per Lord Mansfield*, in civil cases, the court will force parties to produce evidence, which may prove against themselves, or leave the refusal to do it after proper notice to the jury.

Roe v. Harvey. 2489

63. The

Rule in construction of.

Cowp.

63. The rule of law in respect of the construction of deeds is, that they shall operate according to the intention of the parties, if by law they may, and if they cannot operate in one form, they shall operate in that which by law will effectuate the intention.

Goodtitle v. Bailey. Page 600

Douglas.

64. Indorsement on bargain and sale by proper officer, is evidence of enrollment. 57

65. If two witnesses hands are to a deed, and one of them swears that he did execute it, and the other that he did not, it shall be read. 205

1 *Durnford and East.*

Estoppel.

66. Where a person held under a lease from tenant for life, in which the reversioner who was then under age was named, but it was not executed by him until after the death of the tenant for life, qu. how far the lessee might have been estopped in an action of covenant brought by the reversioner, if he had not himself shewn these facts by his declaration.

Ludford v. Barber. 86

Id.

67. A lessor is not estopped by his deed, from going into evidence to shew that a cellar situated under the demised premises, particularly described, was not intended to be demised.

Doe on dem. Freeland, v. Burt. 701

2 *Durnford and East.*

Notice to produce.

68. Where a deed is in the hands of the opposite party, and he has notice to produce it, and does not do so, it must *prima facie* be taken to be duly executed, and must be received in evidence without proof of the execution for it being in the hands of the opposite party, it cannot be known who the subscribing witnesses were, and so the party cannot be prepared to prove it.

The King v. Inhabitants of Middlesex. 41

Surety joins in receipt for consideration.

69. Where an annuity bond, granted by two, becomes void by the neglect of the grantee in not registering a memorial under 17. Geo. 3. c. 26. he cannot recover back any part of the consideration money, from one who was known to be only a surety for the other, and had not in truth received any part of it, notwithstanding they both joined in a receipt for it.

Straton v. Rastall. 366

70. An

2 *Durnford and East.*

70. An annuity deed is absolutely void, and not merely voidable, if the memorial be not registered according to the directions of the 17 Geo. 3. c. 26. s. 1.

Registry.

Croftley v. Arkwright. Page 603

71. In general the grantor is estopped by his deed, to say he had no interest.

Estoppel.

Fairtitle v. Gilbert. 171

72. But that principle does not apply where the grantor is a trustee for the public.

Ib.

73. Still less can it apply where the trustee deriving his authority under a public act of parliament, grants that which the act does not empower him to do.

Ib.

3 *Durnford and East.*

74. A deed may be pleaded as lost by time and accident without profert.—*Read v. Brookman*, E. 29 Geo. 3. 151.—Or destroyed.—*Totty v. Nesbitt*. T. 24 Geo. 3. *Ib.* 153. n. (c) but if it appear by the record that the defendant had *oyer* of a copy only, it is error.

Lost without profert.

Mattison v. Atkinson. E. 27 G. 3. *Ib.* 153.—n.

75. Where the consideration expressed in the deed of conveyance, under which the *pauper* claimed a settlement, was 28l. parole evidence was admitted to prove, that 30l. was the real consideration.

Parole evidence, actual consideration.

Rex v. Scammonden. 474

76. Lord *Kenyon*.—It is clear, that the party may prove other considerations than those expressed in the deed—in the case of *Filmer v. Gott*, (7 Bro. Cases in Par.) the consideration mentioned in the deed was 10,000l. and natural love and affection—an issue was directed by the lords commissioners to try whether there was any other consideration than 10,000l. the estates being worth near 30,000l. on appeal to the lords this was confirmed, and the jury found, that natural love and affection constituted no part of the consideration—the deed was afterwards set aside.

Id.

Ib.

77. Plaintiff covenanted to build two houses for 500l. by a certain day, and averred in an action of covenant for the money, that the houses were built in the time—evidence that the time had been enlarged by parole agreement,

Parole evidence to enlarge.

and the houses finished within the enlarged time, cannot be received.

Little v. Holland. Page 590

4 *Durnford and East.*

By one partner for the other.

78. If A. execute a deed for himself and his partner, by the authority of his partner, and in his presence, it is a good execution, tho' only sealed once.

Ball v. Dunsterville & another. Trin. 31 Geo. 3. 313

Hen. Blackstone.

Leasehold, release of all lands.

79. A deed of release, containing the words, "all lands, &c. belonging, used, occupied, and enjoyed, or deemed so taken or accepted as part thereof," &c. will pass *leasehold* lands which answer that description as freehold, especially against the releasor.

Doe on dem. of Davies & another v. Williams. T. 28 G. 3. 25

Reference to printed paper.

80. A deed poll, containing an insurance against fire, may refer to conditions in a printed paper, without stamp, seal, or signature.

Routledge v. Burrell. Trin. 29 Geo. 3. 254

2 Hen. Blackstone.

Part lost, profert, residue.

81. Where in setting forth a conveyance, it was stated that a release was cancelled by the seal of the releasor being taken off and destroyed, and that part of the deed was destroyed or lost, with a profert of the residue, it was holden to be good pleading. The omitting to state the consideration of a bargain and sale, cannot be taken advantage of on a general demurrer. *Bolton v. the Bishop of Carlisle, the Earl of Lonsdale, and Smith, Clerk.* 459

Ver. and Scr.

Delivery.

82. Where the original delivery of a deed was not void, but had an effect, the deed is not capable of a new delivery; and circumstances may be equivalent to an actual delivery.

416, 424, 457

Construction.

83. No words in any deed or instrument which may have a significant and operative meaning without injuring the natural and obvious sense of any other part of the deed or instrument, shall be as nugatory and redundant. 160

Several instruments, same matter.

84. When two or more deeds or instruments, act upon one and the same subject matter, they ought to be considered

considered as one and the same instrument, and each is to be made auxiliary to the other, in order to come at the true meaning of both; in like manner as one part of the same deed or instrument ought to be made auxiliary to the other, in order to come at the true sense and meaning of the whole.

Page 160, 161

85. When any deed or instrument is of doubtful or ambiguous construction, one of the best ways of explaining it is by referring to the act of the parties to that deed or instrument.

Construction.

161, 135

86. Evidence cannot be given of the contents of a deed before evidence is given of the loss of it. When weaker evidence than a deed itself is offered, two things must necessarily be proved:—first, that such a deed had existed:—secondly, that it had been lost. Memorial may be offered as proof of the existence of the deed, but not as a substitute for the deed before proof of the loss of the original deed.

Letter of Baxter v. Clements. 263

87. The copy of a deed was read as evidence, though not proved to be examined by the original, that being proved to be burned by the fire in *London*.

Mod. R. 4

Espinasse, Cases of N. P.

88. Any alteration in an instrument requiring a stamp, makes it a new instrument, and requires a new stamp.

Alteration of instrument.

Bowman v. Nicoll. 81

89. A party who has executed a deed, shall not be permitted to acknowledge it; it must be proved by the subscribing witness.

Subscribing witness.

Johnson v. Mason. 89

90. When a party executes a deed under a power of attorney, the power of attorney ought to be produced.

Power of attorney.

Ib. 90

Devise.

Holt.

Vested remainder.

1. **R**EMAINDER to the heirs male of his body now living, gives a present remainder vested, and the words, "now living," describe the person to take after the testator's death, and the first particular estate determined.

Burchet v. Dariaant. Page 223, 224, 225

Condition, marriage.

2. *A.* devises to his daughter *I.* and her heirs for ever, provided she marry his nephew *T.* at or before her age of twenty-one, and if she refuse, to his second daughter *M.* and her heirs, &c. *T.* dies, whether *I.*'s estate be absolute, she not having refused.

Thomas v. Howell. 225, 226, 227

General subsequent clause.

3. A general subsequent clause in a will not to be carried farther than the first clause which is special.

Ib. 226

Term, perpetuity.

4. A devise of a term to *R.* and the heirs of his body, and if he dies without issue living *I.* then to *I.* and the heirs of his body, this is good to *I.* upon the contingency, and no perpetuity.

Lamb v. Archer. 227

5. Devise in trust for *E.* &c. in case within three years she marry *G.* and in her default, &c. in trust for *T.*; this is a condition precedent, and must be performed before the estate can vest.

Lord Falkland v. Bertie. 230

Perpetual charge.

6. A devise of lands to *A.* with a perpetual charge upon them, gives a fee.

Smith v. Tindall. 236

Hereditaments.

7. A devise of all my hereditaments, gives a fee. *Ib.*

Rents.

8. By a devise of all my real and personal estate, rents will pass.

Countess of Bridgewater v. Duke of Bolton. 231

9. No

Salk.

9. No construction or implication to be admitted against the express words of a devise. Implication.

Goodridge v. Cornist. Page 226, 227

10. And where a particular estate is expressly devised, a contrary intent is not to be implied from subsequent words. Id.

Ib. 236

11. *Expressio eorum quæ tacite insunt nihil operatur* (in Id.
margine.) 233

12. The testator's intent is to be collected from the words of the will, and not from extrinsic circumstances; for the words of testator will not do, unless there be sufficient words to manifest that intent. Intent, extrin-
sick circum-
stances.

Cole v. Rawlinson. 235

13. And words in a will that are good sense in themselves are not to be transposed. Transposition
of words.

Ib. 236

14. And the legal sense of the words is to be taken, if a contrary sense be not manifestly implied. Legal sense.

Aumble v. Jones. 238

15. The word (granted) in a will, construed as if it had been agreed to be granted. Grant.

Milford v. Smith. 225

16. Note, matter that cannot appear till found, when found is not to be regarded in the exposition of wills. Matter ex-
tinguish words
of will.

Cole v. Rawlinson. 235

17. A devise to *H.* without other words will pass but an estate for life, unless other words, as, "for ever," be added. Estate for
life.

Ib.

18. The words "all my estate," in a will, pass both the thing and all the testator's interest therein. All my estate.

Ib. 236

19. So "I give all my estate, right, title, and interest in, &c. and also the house called, &c." gives a fee in the house. Fee.

Ib. 234

20. So the words "whatever else I have not disposed of," will carry a fee in a will. Id.

Hopewell v. Ackland. 239

21. So

Salkeld.

Fee.

21. So a devise to *A.* for life, and then to be at her disposal, &c. gives an estate for life, with power to dispose in fee.

Thomlinson v. Dighton. Page 239

Power
appendant.

22. See the difference between a power appendant to the estate, and where it is collateral. *lb.* 240

After pur-
chased lands.

23. A devise of all the lands I shall have at my decease, will not pass lands purchased after the devise.

Bunter v. Coke. 237

Chattels.

24. But it seems otherwise in devises of chattles and personal estates. *Vide.* *lb.* & 238

Term to se-
veral.

25. A devise of a term of years to several successively for life, after all are dead the devisor's executor shall have the residue.

Eyres v. Faulkland. 231

To first son,
none born then.

26. A devise to the first son of *A.* (*A.* having none at that time) is void.

Scatterwood v. Edge. 229

To infant in
ventre.

27. But a devise to an infant *in ventre sa mere* is good, because *in esse.* *lb.* 230

Rents and
profits.

28. Devise of the rents and profits of lands to *A.* to be paid by the executors, is a devise of the lands to *A.*

South v. Alleine. 228

Limitation,
term.

29. Limitation of a term to *A.* and the heirs of his body, and if he dies *sans* issue, living *B.* then to *B.* is good.

Lambe v. Archer. 225

Tenancy in
common.

30. Devise to *A.* and *B.* and their heirs, and the longer liver of them equally to be divided between them and their heirs, makes a tenancy in common.

Goodright v. Cormick. 226, 391

Contingent
remainder.

31. A contingent remainder must vest during the particular estate, or *eo instante* that it determines.

Reeve v. Long. 228, 238

(*V. Butler's Notes, Co. Lit. 298. a. note 259.*)

32. *Ergo*

Salkeld.

32. *Edge* a remainder to the right heirs of *I. S.* is void, if the particular estate determines in the life of *I. S.* Contingent remainder.
Reeve v. Long. Page 238

33. A devise to *A.* for fifty years, if he so long lives, remainder to the heirs male of *A.* remainder to *B.* the last remainder takes effect presently, because the first remainder was void. Id.

Goodright v. Cormick. 226

34. A devise to *A.* for life, and if he have issue male, then to such issue male and his heirs; and if he die without issue male to *B.* and his heirs, *A.* has but an estate for life, and both remainders are contingent. Id.

Loddington v. Kime. 224

35. Note, there may be a possibility of reverter where no remainder can be limited. Reverter.

Eyres v. Falkland. 231

36. A devise by the father to the son and his heirs forever, and for want of such heirs, then to the right heirs of the father, is an estate tail in the son; such heirs must mean issue. Estate tail.

Nottingham v. Jennings. 233

37. *A.* having a remainder in tail, with a reversion in fee, devises to one son in tail, remainder to the other in fee, is good, because it alters the tenure. Tenure altered.

Badger v. Loyd. 233

38. Devise to *A.* if *B.* a stranger dies without issue, is an executory devise. Executory devise.
Ib.

39. *Aliter*, if *B.* were tenant in tail in remainder to the devisor. Id.
Ib.

40. *Per Powell*, justice.—There are three kinds of executory estates, one where the devisor parts with his whole fee simple, but upon some contingency qualifies that disposition, and limits another fee upon that contingency; the second sort is where he gives a future estate to arise upon a contingency, and does not part with the fee at present but retains it; the third sort is of terms. Id.

Scatterwood v. Edge. 229

41. A limi-

Salkeld.

Executory
devise.

41. A limitation *per verba de presenti*, will make an ex-
ecutory devise, *aliter* if *per verba de futuro*.

Goodright v. Cormick. Page 236

Descent.

42. A. having two daughters, one has a son and dies, A.
devises lands to the son, he takes by the devise and not by
descent.

Reading v. Rosston. 242

Strange.

To heir.

43. A general devise to the heir is void, because he has
a better title by descent.

Smith v. Triggs. 491

(Trust in fee.

44. Devise to A. and B. in trust for others in tail and in
fee, is a devise in fee to the trustees, though there be not the
words "heirs or for ever."

Shaw v. Weigh. 798

Executory
devise.

45. To the eldest son of Thomas Gore, he having none at
the time, a good executory devise.

Gore v. Gore. 958

Infant in
ventre.

46. Devise to an infant *in ventre sa mere*, with a contin-
gent remainder in case such infant die under age, and there
is no such infant, the devise over shall immediately take
place.

Andrews v. Fulham. 1092

Joint tenan-
cy.

47. To his daughter and her children, and their heirs,
(one child being born) gives a joint tenancy in fee.

Oates v. Jackson. 1172

Or rejected.

48. To A. in fee, but if he dies before twenty-one years,
or marriage, and without issue, to B.; if A. attains twenty-
one years, the devise over fails though he dies unmarried.

Barker v. Suretees. 1175

Lapsed de-
vise.

49. Devise to M. and her issue lapses by the death of de-
visee in the life of the devisor.

Goodright v. Wright. 25

Heirs male.

50. Devise to the heirs male of the body of A. the devisee
shall take, though not heir general.

Brown v. Barkham. 35

51. Rise

Strange.

51. Rise of executory devises.

Marks v. Marks.

Page 130

Executory devise.

52. An executory devise held good upon a contingency to arise a year after a life.

Id.

Id. 133

53. If my daughter die before her mother or without heirs, and my wife have an heir male, I give him all, &c. not a good devise.

Contingency remote.

Right v. Hamond.

427

54. Devise to *A.* for life, and after to his heirs male of his body and his heirs for ever, and for want of such heir male, remainder over as an estate tail in *A.*

Estate tail.

Goodright v. Pullin.

729

55. What words in a will create an estate for life or in tail.

Estate in tail for life.

Shaw v. Wigh.

802, 849

56. To *A.* for life, then to trustees to preserve, &c. then to the heirs of the body of *A.* gives an estate tail.

Estate tail.

Coulson v. Coulson.

1125

57. By a devise of ground rents on leases for years, the reversion passes.

Ground rents.

Maundy v. Maundy.

1020

58. Cross remainders by implication must arise from words necessarily importing them.

Cross remainders, implications.

Comber v. Hill.

969, 996

59. To *A.* for life, remainder to *B.* provided that if *C.* in three months pay to *B.* five hundred pounds, &c. this condition will descend to heir of *C.*

Condition, heir.

Marks v. Marks.

129

60. An executor is presumed to take a term as executor, and not as devisee, without proof of his assent.

Executor, assent.

Young v. Helmes.

70

61. Testator has a term, and the trust of the inheritance, and devises the lands by a will not duly executed to carry the inheritance, the term will not pass.

Term, inheritance.

Whitechurch v. Whitechurch.

619

(Nature of terms to attend the inheritance, see *Butler's Notes, Co. Lit.* 208, *a.* note 105 and 290, *b.* note 249. & *Dar.* and *E.* 755, 763.)

62. A

**Introductory
clause.***Hardwicke.*

62. A general introductory clause is a key to explain particular devises in the will.

Maudy v. Maudy.

Page 134

**Negative
words disinherit.**

63. Negative words in a will, will not disinherit the heir; but they are proper to explain other parts of the will.

Ib. 134, 135**Ground rents.**

64. See where the reversion of the lands out of which ground rents are reserved, passed by the devise of testator's ground rents.

Ib. 135**Contingent
devise.**1 & 2 *Wilson.*

65. Testator devises that if he dies before he returns from *Ireland*, his estate shall be sold, &c. he does return and dies, and this will is found in his keeping at his death, it was only a contingent devise and shall not take effect.

Parsons v. Lane. 243, v. 1**Description of
the thing.**

66. A *feme covert* as executrix to *A.* and administratrix to *B.* is entitled to 700*l.* bank stock, her husband devises to her 700*l.* *India* stock, which he is interested in, or intitled to, and after the making his will, she transfers the bank stock to him; it shall pass by the words *India* stock, for he had no other stock.

Dore v. Geary. 247, v. 1**Fee without
the word
estate.**

67. As to my temporal estate I dispose thereof as follows, &c. and afterwards says, "All the rest of my goods and chattels real and personal, moveable and immoveable, as houses, tenements, &c." (without the word estate or other words of limitation) passes a fee.

Grayson v. Atkinson. 333, v. 1.**Contingency.**

68. A devise to one for life and after to her issue, and if she has no issue, power to dispose thereof at her will and pleasure, the contingency of issue never happened, she took a fee.

Goodtitle v. Otway. 6, v. 2**Executory
devise transfer-
able.**

69. An executory devise in fee is like a contingent remainder, and transferable to the heir of the executory devisee, who dies before the contingency (upon which it depends) doth happen.

Goodright v. Searle. 29, v. 2

70. What

1 & 2 Wilson.

70. What words in a will only create an estate for life. *Estate, life.*
Roe v. Holms. Page 80, v. 2.

71. An executory devise was never made good but for the sake of the intention of the devisor. *Executory devise, intention.*
Driver v. Standring. 88, v. 2

72. A devise to "G. G. and after his death to the issue of his body and the heirs of the body of such issue," is an estate tail in G. G.
Roe v. Grew. 322, v. 2

73. A. being *cestuy que trust* of a term in *Blackacre*, afterwards purchases the fee in his own name, and devises *Blackacre* in fee to his heir, whom he makes executrix and residuary legatee, is a *feme covert*, and who dies, the term shall go with the fee to the heir at law and not to her husband, who is her personal representative. *Feme covert, residuary legatee.*

1 Blackstone.

74. Objections to the certainty of a devise arising from parolevidence, may be cleared by parole evidence. *Parol evidence.*
Jones v. Newman. T. 24 Geo. 2. 60

75. Subscribing witnesses to a will. swearing to the testator's incapacity, contradicted by other evidence. *Witness, incapacity of testator.*
Low v. Falliffe. P. 2 G. 2. 365
 (See Witnesses.)

76. Devise to an heir at law in tail, with a proviso for taking the testator's name, is not a conditional limitation. *Condition to take name.*
Gulliver v. Ashby. M. 7 Geo. 3. 607

(V. *Ferne Contin. Rem.* last edition, p. 409, 411, and *Butler's notes, Co. Lit.* 327. a.)

77. Quere, how far an heir could take advantage of a condition for taking a name, and at what time. *Id.*
Ib.

78. Devise on condition precedent, that if A. marries without a competent portion, or without consent of trustees, his issue should not inherit, is performed by having such portion only without consent, especially as one of the trustees became afterwards concerned in interest. *Marriage without consent.*
Long v. Dennis. P. 7 Geo. 3. 630

79. A de.

1 *Blackstone.*

Estate tail.

79. A devise to *A.*'s three sons successively in tail male, remainder to all and every other son of *A.* without naming any estate, remainder for want of such issue to *B.* in tail male; the other sons of *A.* take an estate in tail male.

Evans on demise of *Brooke v. Astley*. T. 4 Geo. 3.
M. 5 Geo. 3. Page 499. 521

Fee.

80. Devise to *A.* for the use of *B.* till *B.* attains the age of 21, and then to *B.* in fee; the fee vests immediately in *B.*

Denn on the demise of *Satterthwayte v. Satterthwayte*.
M. 5 G. 3. 519

Fee for life.

81. Circumstances twisted together, will interpret a devise to be in fee, which on the face of it is only for life.

Frogmorton lessee of *Bramston v. Holiday*.
H. 5 Geo. 3. 535

**Of annuities,
fee in executor.**

82. Devise of annuities in fee, payable by an executor and some of them to the heir at law, vests the fee simple in the executor.

Oates on the demise of *Markham v. Cooke*.
E. 5 Geo. 3. 543

**Executory
uses deviseable.**

83. Contingent springing and executory uses, if descendible are also deviseable.

Roe v. Griffiths. M. 7 Geo. 3. 606

**Estate life,
remainder, trustees,
same instrument.**

84. Devise to *I. W.* for life, remainder to trustees during the life of *I. W.* remainder to the heirs of the body of *I. W.* is an estate for life and not an estate tail, there being words of restriction that *I. W.* shall not sell for longer than his own life, and the estate being devised to that intent.

Perrin v. Blake. E. 9 Geo. 3. 672

Id.

Reversed in *Cam. Scacc.* H. 12 Geo. 3.

**Remote contingency,
failure of issue.**

85. Executory devise to the heirs of *A.*'s body by a second husband, on failure of issue by the first then living, too remote a contingency and therefore void.

Goodman v. Goodright. M. 33 Geo. 2. 188
(V. 2 Burr: 879. *Butler's Notes*, Co. Lit. 379. b.)

**Executory
devise, estate
tail.**

86. Devise to *A.* for ninety years, if he so long live, remainder to the heirs of his body, and subject to those estates and contingencies to *B.* in tail, remainder to *C.* in fee; the heirs of the body of *A.* take an estate tail by executory devise.

Harris v. Barnes. H. 8 Geo. 3. 643

87. Devise

Blackstone.

87. Devise of a leasehold estate for lives to his daughter *By implication*
Barry, after the death of *Betty* the next *cistuy que vie*, is a *tion.*
 devise by implication to *Betty*. *Roe* on the demise of *Bend-*
v. Summerfet. P. 10 Geo. 3.

Roe v. Summerfet. Page 692

88. Devise to the heirs male of *I. S.* in a will, (who are *Estate life,*
 to enjoy it for their lives, of which none of them are *and of inheri-*
 wants any longer, nor shall it be in any of their powers *tance joined.*
 to sell or dispose of the same) and afterwards in a schedule
 annexed, this estate being recited to be given to *I. S.* shews
 the intent of the testator to give him an estate for life,
 which the law shall conjoin to the estate given to his heirs
 male, and construe him to be tenant in tail. *Hayes* on the
 demise of *Foorde v. Foorde. P. 10 Geo. 3.*

Hayes v. Foorde. 698

89. A general residuary devise will not carry a reversion, *Residuary de-*
 which in the same will is devised to the testator's right heirs, *vise, reversion.*
 unless under special circumstances. *Smith* on the demise of
Davis v. Saunders. H. 11 Geo. 3. 736

90. Tenant for life, remainder to the heirs male of his *Contingent*
 body in fee, and if tenant for life died without issue, re- *remainder, dou-*
 mainder over, is a contingent remainder, with a double as- *ble aspect.*
 pect, and may be barred by the recovery of tenant for life.
See on the demise of *Brown v. Holmes and Longmire.*

T. 11 Geo. 3. 777

(*V. Ferne Con. Rem.* last edition, 347, 348. 3 *Will.* 337)

91. Devise to *A.* for life, remainder to his son *B.* and his *Tenant for*
 heirs male, remainder to his next heir male, the elder before *life, remainder.*
 the younger, if no male issue left behind *A.* the estate de-
 volve to the females, and if no females, then *A.* to give and
 dispose as he thinks fit; *A.* is tenant for life, remainder to
 his first and other sons successively in tail male, remainder to
A.'s daughter in tail, remainder to *A.* in fee.
Fell v. Fell. P. 13 Geo. 3. 888

92. The preamble of a will, "as touching the disposition *Estate in fee,*
 of all my temporal estate," will not (alone) cause a devise of *all temporal es-*
 certain houses to *A.* without any further disposition of the *tates.*
 same to be construed an estate in fee simple.

Frogmorton on the demise of *Wright v. Wright.*
P. 13 Geo. 3. 889

93. By

2 *Blackstone*.

93. By a devise of "all the advowsons, for the purchase of which I have contracted," (with directions for completing such contracts) or a certain sum in lieu of the same," the testator then being under contract for the purchase of one advowson, and the said certain sum being equivalent to the purchase money. An advowson formerly purchased before the making of the will shall pass. *Sed Quere.*

St. John v. Bishop of Winchester. Page 930

Fee.

94. Devise of his estate at N. to A. in tail, remainder to A. in fee, if he survives B. his wife; but if B. survives A. then he gives the said estate and premises, (subject to an annuity to B. for life,) to C.; this is fee simple in C.

Stiles v. Walsford. H. 14 Geo. 3. 938

Estate-tail.

95. Devise to the heirs of the body of A. the elder of such issue, and his, her, and their heirs, to inherit before the younger, and his, her, and their heirs, remainder over, vests an estate tail in the eldest daughter of A. (there being no son,) with remainder in tail to the youngest.

Henry v. Purcel. E. 15 G. 3. 1002

Designatio personæ.

96. Devise to the heir of M. may be good, as *designatio personæ*, and he may take in the life time of M.

Goodright on demise of Brooking v. White. P. 15 Geo. 3. 1019

Rents and profits.

97. Devise to receive rents and profits, during the lives of the testator's four daughters and the survivor, and to pay the same to such survivor, and the children of such as die, remainder to the children (after sale), in equal portions; the four daughters during their lives are entitled to the annual rents and profits.

Saunders v. Lowe. E. 15 Geo. 3. 1014

Executor, fee-simple.

98. Devise of a life annuity to A. to be paid by my executor after named, and then a devise generally of a specific copyhold estate to B. with a residuary devise of all the personal estate charged with debts, legacies, and making B. executor, gives him a fee simple in the real estate.

Goodright on the demise of Phipps v. Allin. M. 16 Geo. 3. 1043

Estate life.

99. Devise to A. and B. of all his real and personal estate, to be equally divided between them, or the longest survivor, paying his lawful debts, and after their decease to the

the male heir, gives A. and B. only a conditional estate for life.

Doe on the demise of Cole v. Weston. T. 18 Geo. 3.

Page 1215

2 *Blackstone.*

100. Devise to A. of "the next turn or presentation to the church of B. after the death of the present possessor, and after the death of A. the said living to revert to the testator's heir," is a devise of the next turn of presenting absolutely, and not merely of getting himself presented.

Advowson.

Lew v. the Bishop of Lincoln. M. 19 Geo. 3. 1240

Devise "all my estate in A." to my niece and her heirs, (the testator having only a copyhold in fee, and a long term of years in that parish), will carry both these interests to the niece, if so intended by the testator, though there is a bequest of all his goods, chattels, and personal estate to B.

All my estate.

Roe on the demise of Pye v. Bird. T. 19 Geo. 3. 1301

101. Devise to a man and his son in tail male, and in failure of such issue male, remainder over, the devisee having then no issue, gives the father an estate in tail male.

Estate-tail.

Wharton v. Gresham. E. 16 Geo. 3. 1083

102. Land occupied with an house, and highly convenient for the use of it, will pass in a will by the word appurtenances, though held for a different term.

Appurtenances.

Doe on the demise of Lempriere v. Martin. E. 17 Geo. 3. 1148

103. By a devise to the second son (then unborn) of A. B. for life, and after his decease on the accession of his paternal estate to his second son and his heirs male, with remainders over; such second son of A. B. when born, will take an estate in tail male, by way of executory devise, determinable on the accession of the family estate, and in the interim, the lands will descend to the heir of the testator.

Estate-tail, executory devise.

Nicholl v. Nicholl. M. 18 Geo. 3. 1159

104. Trust of a term to arise on the contingency that A. and B. shall die, without leaving issue male, or second son, that such issue male shall die without issue, is good, in case A. and B. have a son, who dies without issue in the life time of the survivor of A. and B.

Issue male, dying without issue.

Longhead on demise of Hopkins v. Phelps. E. 10 Geo. 3. 704

105. A

- Legacy, time, payment.** 105. A legacy is a vested interest where the time is annexed to the payment only, and not to the legacy itself, or otherwise where the time is part of the condition of it becoming payable.
Goff v. Nelson. Page 127
- Legacy, land.** 106. The term "legacy," may be applied to land, as well as money.
Hope v. Taylor. 271 to 273
- Whole property devised, exception.** 107. Wherever the whole property is devised with a particular interest given out of it, the operation of this is by way of exception out of the absolute property.
Goodtitle v. Whisby. 233, 234
- Condition precedent.** 108. Where an absolute property is given, and a particular interest given in the mean time, "until the devisee shall come of age, &c. and when he shall come of age, then to him, &c."—The rule is, that this shall not operate as a condition precedent, but as a description of the time when the remainder man shall take in possession. *Ib.*
- Rules of construction.** 109. In construing wills.—1st, the intention of the testator ought to prevail, if agreeable to the rules of law.
Ib. 233 to 272, 273
- Secondly,—Adjudged cases may properly be argued from, if they establish general rules of construction. *Ib.* 233
- (Rules of Construction. V. *Butler's* notes, *Co. Lit.* 376. b.)
- Credible, competent.** 110. The epithet "credible," is not synonymous to "competent."
Windham v. Chetwynd. 417
111. The consideration of credibility arises after competency allowed, and pre-supposes the evidence given. *Ib.*
- Id.** 112. The credibility of the witnesses makes no part of the essential form. *Ib.*
- Id.** 113. This epithet "credible," seems to have slipped into the act in this inaccurate clause, without attention to its impropriety.
Ib. 418

Burr.

114. The act of 29 C. 2. c. 3. was not probably drawn
by lord chief justice *Hale*. Credible,
competent.

Windham v. Chetwynd. Page 417

115. The power of devising ought to be favoured, and
the act of 29 C. 2. c. 3. did not mean to restrain it.—420.
Id.
rise and progress. *Ib.*

116. It is more reasonable now than among the Greeks
and Romans, or before the conquest, and why it is so. *Ib.* Id.

117. The disability of a witness from interest, differs from
positive incapacity, and nice objections of remote interest,
will not disqualify a witness in case of a will. *Ib.* 422 Id.

118. A witness shall not intitle himself to a devise by his
own subscription, which at the time of subscribing, he could
not have proved by his examination, (for *testis in propria*
causa non adhibendus,) but if he had as great an interest the
other way; if his interest at the testator's death could not
take effect, if he has released, if there has been payment,
or even tender, he is a good witness. *Ib.* 423, 424 Id.

119. Devises of land differ extremely from wills, and
how. *Ib.* 429 Devises of
land.

120. A devisee under a void devise, being a subscribing
witness, may by his subscription, authenticate the rest of
the will; at least, there is great weight in the distinction said
to be laid down by *Holt*, chief justice, that such will is only
void *quoad* the devise to the witness. 428, 429 Witness.

N. B. This is contrary to the opinion of lord chief jus-
tice *Lee*. *Ib.* Id.

121. A charge upon land "to pay debts," ought not
to incapacitate subscribing witnesses, who are creditors, even
though they wanted and claimed the benefit of it, (which in
this case they did not.) *Ib.* 430 Id.

122. Every honest man ought to make such a charge in
his will, he who omits it is said to sin in his grave. *Ib.*

123. The most usual witnesses are generally in some de-
gree creditors of the testator (as servants, attorney, parson,
apothecary, &c.) and the disallowing such witnesses, can an-
swer no end of public utility. *Ib.* 11.

1 Burr.

Witness.

124. For presumptions of bias may be taken off, and presumptions of public utility answered.

Windham v. Chetwynd. Page 430

Id.

125. If land is charged with legacies by a proper solemn devise, the legacies may be given altered or revoked, by a subsequent will unattested. *Ib.*

Id.

126. Presumption of bias from a legacy, is taken off by release. *Ib.*

Id.

127. An objection to a witness of "benefit at the time of subscribing," may be taken off by his being disinterested at, or after the death, (though lord chief justice *L.* did indeed think it could not be taken off by any subsequent fact.) 423 to 429

And this is consistent with the Roman law. *Ib.*

Id.

128. First, there never was a time when interest under a will, was in the Roman law, any objection to the subscribing witness. 425

Id.

129. Secondly, the Roman law concerning testaments and witnesses to them, fully stated and explained. *Ib.* 426

Id.

130. Thirdly, the code was published *tertio Justiniani*; the digest and institutes *septimo*. *Ib.*

2 Burr.

Intention.

131. No particular technical term is necessary to convey a testator's meaning, it must be collected from the scope of the whole will, compared with its several parts; the court cannot make a will, or interpret it by an arbitrary construction, nor take into their consideration any subsequent alteration of events.

Strong v. Cummin. 770, 771

indefinite
nature of issue.

132. It is a future devise to take place after an indefinite failure of issue, which is too remote, as it far exceeds the utmost limits allowed to executory devises, namely, the compass of a life or lives in being, and 21 years after.

Grooman v. Goodright. 878, 879

(1 Bl. 187.—*Baile's notes*, 1 Co. L. 379. b. & *Fine Exec. Dec.* 336.)

133. As

2 Burr.

133. An executory devise, too remote in its creation, cannot be made good by any subsequent event. Executory devise, subsequent event.
Goodman v. Goodright. Page 878

134. Devise that the executors shall sell the testator's land for the payment of his debts, does not in general pass the estate to the executors. Estate passed to executors.
Lancaster v. Thornton. 1030, 1031

135. Devise that his executors shall and may absolutely sell, mortgage, or otherwise dispose of his freehold estate for the payment of such debts, legacies, and funeral expenses, as his leasehold estate should not be sufficient to discharge, is only a power to sell, &c. and no estate passes to the executors. Devise to executors to sell.
Ib. and 1032

136. The intention of the testator is the rule of construing devises, provided it be not inconsistent with the rules of law. Intention.
Doe v. Laming. 1106, 1114

137. Such intention shall be effectuated, where no rule of law prevents it. Id.
Ib.

138. But it cannot prevail against the settled rules and maxims of law. Id.
Ib.

139. There is no such fixed invariable rule, as that words of limitations shall never in any case be construed, as words of purchase. Limitation, purchase.
Ib.

140. For in some cases they may be construed words of purchase, either upon a will, or upon a deed. Will, deed.
Ib.

141. The antient maxim of the law was, "that although the estate be limited to the ancestor expressly for life, and after his death to his heirs (general or special;) yet the heir shall take by descent, and the fee shall vest in the ancestor." Id.
Ib. 1106

142. This maxim was originally introduced in favor of the lord, (to prevent his being deprived of the fruits of the tenure,) and likewise for the sake of specialty creditors. Id.
Ib.

143. The reason of it has now ceased. Id. 1107

2 *Burr.*

144. Yet having become a rule of property, it is adhered to in all cases literally written it.

Doe v. Laming. Page 1107

But where there are circumstances which take the case out of the letter of this rule, it is departed from in favor of the intention. *Ib.*

Trust execut-
ed, executory.

145. There is no solid distinction (as to the point in question in this case,) between a trust and a legal estate, or between a trust executed and a trust executory. *Ib.* 1108

Positive
rules.

146. A court of equity is as much bound by positive rules and general maxims concerning property, as a court of law is. *Ib.*

Court of
equity, of law.

147. If the intention of the testator be contrary to the rules of law, it can no more take place in a court of equity than in a court of law. *Ib.*

Court of law,
intention.

148. On the other hand if the intention be not contrary to law, a court of common law is as much bound to construe and effectuate the will according to that intention as a court of equity can be. *Ib.* 1108, 1109

3 *Burr.*

Intention.

149. The intention of a testator is to be collected from the whole of his will, and such collection must be founded upon the writing itself.

Baddley v. Leppingwell, 1541. V. *infra*, 1622.

Id.

150. Particular cases generally serve rather to confound than to illuminate questions about the intention of a testator. *Ib.*

Id.

151. The construction must be clearly agreeable to the intention of the testator collected from the will and circumstances.

Evans v. Afley. 1581

Id.

152. The testator intended to give the same estate to the after-born sons of C. D. esquire, as to the three prior born, viz. an estate in tail male in succession.

Ib. 1579, 1580

Id.

153. This manifest intention shall prevail against the words. *Ib.*

154. A testa-

Burr.

154. A testator's intention must be collected from all the parts of the will compared together. Intention.

Frogmorton v. Holyday. Page 1622 to 1625
v. *Supra.* 1541.

155. If the first sheet of a will was in the room at the time of the execution and attestation, it would be a good will, and a due execution of it, as to the real estate, as well as the personal estate. First sheet of will in the room.

Bond v. Seawell. 1773

156. But if the first sheet was not then in the room, a doubt might arise whether it was duly executed and attested, with respect to the real estate. *Ib.*

157. Devise to A. and B. and the survivor of them, and the executors and administrators of such survivor, share and share alike as tenants in common, not as joint tenants; this is a tenancy in common, in fee. The words survivors and survivor relate to the death of the testator. Tenancy in common, survivor.

Williams v. Leper. 1886

Burr.

158. The rule laid down in *Shelley's* case, that when the ancestor by any gift, devise or conveyance, takes an estate for life with remainder (mediately or immediately) to his heirs in fee or in tail, the word heirs is a word of limitation, and the estate of inheritance shall vest in the ancestor, and the express limitation for life is of no effect, was neither doubted nor disputed; though the reason of it has long since ceased; yet the question, "whether a testator's manifest intent may not controul the legal operation of the word heirs as a limitation, and turn it into the description of a purchaser," remains still undecided, and depending in the House of Lords in May 1766. Estate to ancestor for life, &c.

Perrin v. Blake. 2579 to 2582

159. In some cases a condition may operate as a limitation, as where there is a devise over, or where an estate in fee is given to an heir at law, upon condition, that it would descend upon himself on his own breach of the condition. Condition, limitation, devise over.

Gulliver v. Ashby, 1941, 1942, 1943.

(Vide *Ferne Exec. Dev.* 310, 311. — 2 *Salk.* 570.)

160. In the latter case a conditional limitation would be implied, although there was no devise over. Id. *Ib.*

161. But

4 Burr.

Condition,
limitation,
devise over.

161. But after an estate tail and no devise over, a limitation cannot be implied.

Gulliver v. Astby. Page 1941, 1942, 1943

Id.

162. A conditional limitation cannot be implied, unless necessary to effectuate the intention of the testator. *Ib.*

In the present case such an implication would be contrary to it, for the testator could not mean that the whole estate should cease. *Ib.*

Estate tail,
cease in part.

163. And a limitation that an estate tail shall cease in part and not in the whole, would be void in law.

Ib. 1941

Restraint of
marriage.

164. That all clauses and conditions in wills in restraints of marriages, ought to be construed with the utmost rigour and strictness against such restraint, and in favour of the person attempted to be restrained.

Long v. Dennis. 2055, 2057

Revocation,
marriage,
child.

165. It is now settled that marriage and a child, is a revocation of a devise of a personal estate, but no case has yet holden marriage alone to be so. 2171

5 Burr.

Heir male
general.

166. Whether a person can take as heir male of the body, without being also heir general.

Wills v. Palmer. 2615 to 2628

Estate.

167. Of all the rest and residue of his estate whatsoever and wheresoever to his wife, her heirs, executors and administrators, is a devise of his land to the wife in fee; the word estate carries every thing, unless tied down by particular expressions.

Roe v. Harvey. 2638, 2639

Cowp.

To child in
ventre, &c.

168. A devise to a son of which the testator supposed his wife to be *ensient*, when he should be 21 years old; but if a daughter, then one moiety of his estate to his wife, and the other moiety to his two daughters (there being one at that time) at the age of 21; if either of the daughters die before that time, her share to the survivor; if both die before that time, both their shares to the wife in fee; if she die, her share to the daughters. The testator died, the wife was not *ensient* at the time of the will or at his death; the daughter died under age and without issue; the wife shall take the whole estate.

Statbam v. Bell. 40

169. One

Cowp.

169. One devises certain lands to trustees in case his personal estate shall not be sufficient for the payment of debts, &c. in aid of it, and "all the rest, residue and remainder of his real and personal estate to his wife;" the personal estate proved sufficient; the lands devised in aid pass to the wife by the residuary clause; so if the personal estate had proved deficient in part only, the wife would have been entitled to the remainder. *Goodtitle v. Knot.* Page 45

Lands in aid of personal estate.

170. A devise of land in *England* is considered in a different light from a *Roman* will; the latter being considered as an institution of the heir, the former as a conveyance by way of appointment. *Harwood v. Goodright.* 90

Roman law.

As to personal estate the law of *England* has adopted the rules of the *Roman* testament. *Ib.* Personal estate.

171. One possessed of three species of estates in the county of H—, viz. one by articles wholly executory, another executory in part, and a third (being an advowson) compleatly executed by a recent conveyance, devises to his wife as follows: all the manors, messuages, advowsons and hereditaments in the county of H—, for the purchase whereof I have already contracted or agreed, or in lieu thereof the money arising by the sale of my real estate in the county of L— (with directions for compleating the contracts; the advowson, the purchase of which was completely executed before the making of the will, shall pass to the wife.

Of hereditaments contracted for, &c.

St. John v. the Bishop of Winton. 94

172. *Per Lord Mansfield.* An heir at law cannot be disinherited by conjecture; it can only be done by express words, or by an implication which manifestly indicates the clear intent of the testator, upon a fair construction of the whole contents of the will, to give the estate from him. *Ib.*

Disinherison of heir.

173. Devise to J. G. for and during his natural life, and after his decease to his heirs and assigns for ever, and for want of such heirs to T. E. his heirs and assigns for ever. J. G. has only an estate tail.

Estate tail.

Morgan & Uxor v. Griffiths. 234

174. To make a devise of lands without any limitation a fee, such a manifest intention must appear that the testator meant to give a fee; as may satisfy the conscience of the court in pronouncing it such. If it is barely problematical, the

Devise without any limitation.

the rule of law must take place; i. e. that it is only an estate for life. *Re v. Blacker.* Page 295

Comp.

Surviving
children, interests
in common.

175. A devise to the testator's eldest son of 2000*l.* also of his three younger sons, G. W. and G. and their heirs a house and close, as tenants in common when they come at age of 21 years; also to his wife a house, and after her decease the same to go to his three daughters and their heirs for ever; and his will further was, that if any of his above-named children should happen to die before they come of age and without issue, then their property and share in any of the above bequeathed premises to be equally divided amongst the rest of his surviving children, share and share alike. The eldest son was of age at the date of the will; two of the younger sons died under age, &c. *Per Cur.* The eldest son and the three daughters are equally entitled with the younger son to the shares of the deceased brothers.

Deen v. Calderston. 257

All my worldly
substance.

176. One seized of the lands of C. and G. in fee, of other lands in B. and B. for lives renewable for ever, and of other lands under leases for three lives with reversionary terms for 21 years from the death of the surviving life in each, and being himself the surviving life in one, devises thus:—*and as to all my worldly substance*, I give to my mother my house and lands of G. with the appurtenances, during her natural life, clear of any deduction; and also my lands of C. (subject to a rent payable thereout) for life, without liberty of committing waste thereon, and after several legacies to relations (one of which was the heir at law) he devises to his mother all the remainder and residue of all his effects, both real and personal, which he shall die possessed of. The mother by this residuary clause takes a fee in all the testator's fee simple estates, and the whole of his interest in the rest of his real property, subject to the charges thereon.

Hogan v. Jackson. 299

Roman law.

177. Distinction between the Roman law concerning wills and our law of devises. *Ib.*

Perpetuity,
limitation.

178. Words of perpetuity in a devise are tantamount to words of limitation. *Ib.* 306

Description
of estate,
quantum of in-
terest.

179. The distinction between words that denote only a description of the specific estate, and words that denote the quantum of interest that the testator has in it is this; if the words

words of the testator denote only a description of the specific estate or lands devised; in that case if no words of limitation are added, the devisee has only an estate for life; but if the words denote the *quantum of interest* or property that the testator has in the lands devised, there the *whole* extent of such his interest passes by the gift to the devisee. The question therefore is always a question of construction upon the words and terms used by the testator. It is now settled that the words *all his estate*, will pass every thing a man has; but if the word *all* is coupled with the word *personal*, or a *local description*, there the gift will pass only personally, or the specific estate particularly described. *Per Lord Mansfield.*
Hogan v. Jackson. Page 306

Cowp.

180. Effect of introductory words in a will—what. *Ib.*
 And also page 356

181. *Real effects* mean real property. *Ib.*

182. An objection that the testator first gave his mother only an estate for life, and made it liable to impeachment of waste, is not sufficiently strong to controul the operation of subsequent words in a residuary clause, manifestly importing an intention to give a fee. *Estate for life,—see.*
Ib. 308

183. Devise to trustees in trust for the use of the heirs male of J. A. and in default of such issue to the use of the heirs male of R. A. and in default of such issue male, to the use of all and every the grand children of J. A. and S. M. as tenants in common; a codicil (bearing the same date of the will,) direct trustees to pay the interest and produce of his real and personal estate to the testator's wife S. A. and to the said J. A. and R. A. during their lives, with survivorship. Eight grand children of T. A. and S. M. were alive at the date of the will. A *ninth* was born before the testator died; *twelve* more were born after his decease, and all in the life-time of R. A. who as well as the devisee J. A. died without issue. Held that as the 21 grand children were all alive at the death of R. A. all were equally entitled. *Tenants in common, after-born children, grand-children.*

Baldwin v. Karver. 309

184. All cases on the construction of wills depend upon the particular penning of the wills themselves, and the state of

if it appears to which they relate: taking also into consideration some general rules as to personal property from being transferred and any.—*Per Lord Mansfield.*

Johnson v. Lister. Page 309

184. There is a material distinction between this sort of instrument: because in these as there are no children in life at the marriage, and the number is uncertain, it must be intended the benefit was intended equally for all; but if it is a will a benefit is intended to children by way of remainder, or upon a contingency which is in contemplation of the testator's death when it may take place, if it ever happens at all: there the same reason holds why it should not be confined to those only who were alive at the time of making the will.—*Per Lord Mansfield.* *Id.*

Immediate devise to children, or upon a contingency, or upon a contingency which is in contemplation of the testator's death.

185. Distinction between an immediate devise to children and a provision for them in marriage settlements, or a devise limited to them by way of remainder, or upon a contingency which is in event; the first only relates to children in life at the time; the second is intended equally for all the children of the marriage; the last extends to all that are in life at the time when the devise vests.

Id. 314

Testator in common.

187. One devises thus: "as touching my worldly estate, I devise the same as follows: I give to my wife E. M. 5*l.* to be paid yearly out of my estate at G. *Item*, to my son J. M. and daughters, 5*l.* each, to be paid twelve months after my decease. *Item*, to my sons T. M. and R. M. whom I make my — and certain my sole executors, all my lands and tenements freely to be enjoyed and possessed alike." J. M. and R. M. are tenants in common, and take a fee.

Leach v. Brigg. 352

All my estate.

188. If a man says, "I give all my estate," that has been construed to pass a fee; or even if words of locality are added, as all my estate in A, it has been held that the whole of the testator's interest in such particular lands will pass, though no words of limitation are added.—*Per Lord Mansfield.* *Id.*

Reversion.

189. One devises all his estates, &c. in the counties of Gloucester and Worcester, and elsewhere in the kingdom of England to trustees, subject to certain charges thereon, and limitations in his marriage settlement, named in trust to stand seized of the said estates in Gloucester and Worcester, or elsewhere, to certain uses; his estates in G. and W. were the

the only estates charged or mentioned in his marriage settlement; but he was also entitled to a reversion of certain estates in the counties of *Oxford* and *Wils.* Held that this reversion passed by the words *elsewhere* in the kingdom of *England.* *Freeman v. Duke of Chandos.* Page 363.

Corp.

190. Devise to S. S. and the heirs of his body lawfully to be begotten, and their heirs for ever; charged with the payment of 8*l.* *per annum* to M. S. during her life, but in the case the said S. S. shall die without leaving issue of his body, then unto W. G. and his heirs charged as aforesaid; and also with 100*l.* to A. B. within one year after W. or his heirs shall be possessed of the lands devised. S. S. takes only an estate tail. Estate tail.

Denn v. Shenton. 410

191. One devises a reversion to his right heirs, and afterwards gives all the residue and remainder of his real and personal estate to A. B. in fee; the reversion does not pass by this residuary devise. Reversion; residuary devise.

Doe v. Saunders. 440

192. One devises, "as to all such worldly estate as God has endued me with, I give as follows: I devise all that my freehold messuage lying in G. to M. R. G. R. and T. R. equally, and afterwards amongst other legacies, he gives ten shillings to his heir at law." The devisees notwithstanding the introductory words, and the disinheriting legacy to the heir, take only an estate for life, and are tenants in common. All my freehold at A. disinherison.

Den v. Gaskin. 765

193. To make such introductory words operate as an enlargement of a devise of lands, without words of limitation added, they must be connected with such devise. Id.

Ib. 660

194. The court will make great use of the introduction of a will in favour of the clear intention of the testator, and in favour of creditors, to make a real estate liable to debts. Intention, estate liable to debts.

Ib.

"I give to one in fee simple," or "all my estate," are tantamount to words of limitation; but there must be words in the will to controul the rule of law; which probably in a variety of instances thwarts the intention of the testator. All my estate, limitation.

Ib.

195. One

Cowp.

Cross remain-
ders.

195. One devises his lands to his brother for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of his brother in tail male successively; remainder to his brother's daughters in tail; remainder to his four sisters and a niece for their lives, share and share alike, as joint tenants in common, and not as joint tenants; remainder to their sons successively in tail; remainder to their daughters in tail; reversion to his own right heirs: Then he devises to another sister, only a small annuity. The four sisters and the niece take several estates for life, with several remainders to their sons and daughters, and there are no *cross remainders*.

Pery v. White. Page 777

Rule as to
cross remain-
ders.

Lord *Mansfield*.—The rule is this; wherever cross remainders are to be raised by implication between *two* and *no* more, the presumption is in *favour* of cross remainders; where they are to be raised between *more* than *two*, there the presumption is *against* cross remainders: but that presumption may be answered by circumstances of plain and manifest intention either way. *It.*

Cross remain-
ders.

196. One devises to his own two brothers and his sister, and the heirs of their bodies as tenants in common, and not as joint tenants, and for want of such issue to his own right heirs; and then gives all the rest and residue of his goods and chattels, as well real as personal, equally between his said brothers and sister, share and share alike; the devisees take cross remainders.

Phipard v. Mansfield. 797

Per Willes, Justice.—There are few cases which come before the court where cross remainders are not meant by the testator. The reason given in the old cases for not allowing the implication of cross remainders between more than two, is to prevent the splitting of tenures. *It.*

Per Ashurst, Justice.—The leaning of courts ought always to be in favour of cross remainders; because that construction is most consonant and agreeable to the intention of testators in general. *It.*

(*V. Butler's Notes, Co. L. 195. b.*)

Remote rever-
sion.

197. By a devise of *all that* the testator's manor of C. &c. and also all that his capital messuage, and all and every his lands, tenements and hereditaments whatsoever, situate, and being, in or near P. P. or elsewhere, in the

the county of *Gloucester*, to his executors upon trust, to sell and divide the money equally amongst his younger children. A remote reversion in fee in another estate in the county of *Gloucester*, to which the testator was entitled after three estates tail, was held to pass to the trustees.

Atkyns v. Atkyns. Page 808

Cowp.

198. A testatrix devised a messuage and lands to her eldest daughter A. and the heirs of her body for ever; and for want of such issue to her second, third and fourth daughters successively in tail; charged and chargeable nevertheless, with 180*l.* to be levied out of the first annual profits, and to be divided equally amongst the three younger daughters, and that the executors should stand seised of the said messuage and lands, from the decease of the testatrix, for so long time as they or their assigns should have raised the said sum; or so long as until the same should be discharged by the said A. or her assigns, and from and immediately after the raising, &c. or other payment of the said sum by A. or her heirs, and then that A. and her heirs should enjoy the said messuage, &c. for ever; only allowing the three younger daughters and a cousin, the use of some rooms till they were married. Held that A. took only an estate tail.

Estate tail.

Hanson v. Fyldes. 833

199. Where lands are devised without words of limitation, and the lands are charged with a gross sum; the devisee by implication of law takes a fee; because the manifest intent of the testator being decisive, and no technical form of words necessary to express it. The certainty that the testator must mean a bounty to his devisee, is sufficient to supply the want of formal limitation.

Fee by implication.

Doe v. Fyldes. 841

200. But where an express estate for life, or an express estate tail is given in terms, no such implication can arise from such charge only.

Ib.

201. An heir at law cannot be disinherited by the plainest intention apparent on the face of the will; unless the estate is completely disposed of to somebody else.

Disinherison.

Denn v. Gaslin. 661

Dougl.

202. A republication requires the same solemnities as the original publication.

Republication.

Brady v. Cubitt. 35

203. Instance

Dougl

Prior devise,
condition
precedent.

203. Instance of a prior devise operating as a condition precedent.

Doe v. Shipphard. Page 74 to 79

Per Lord Mansfield—The court may supply the omission of express words, if they had a plain intent; but unless that is the case they cannot do it. : 74

Id.

204. Instance where a prior devise does not operate as a condition precedent.

Bradford v. Foley. 63 to 66

Child in ventre.

205. If a testator having one child, and supposing his wife *ensent*, devise his estate in moieties between the children (if the unborn child should be a daughter,) and the wife, with survivancy between the children as to their moiety, and *that* moiety over to the wife; if both children should die before 21, without mentioning the event of the wife not having a child; the wife though not *ensent*, shall take the whole on the death of the only child before 21

Statton v. Bell. (ib. cited.) 65, 66

Testator in
sensible.

{*V. Butler's notes, Co. Lit. 298. a. Note 259.—Self.*
227.)

206. If a testator is in a state of insensibility when his will is attested, it is not executed within the meaning of 29 *Car. 2. cap. 3.* although he be corporally present.

Right v. Price. 329 to 332

Contingent
remainders.

207. If an estate is devised to the testator's son for life, and after his death to the son's children and their heirs; and in case the son die without issue, then to the testator's two daughters, then in *e. e.* and their heirs; the estate to the children of the son, and that to the two daughters, are both contingent remainders in fee.

Goodright v. Dunham. 251 to 255

State tail.

208. Under a devise to A. when he shall be 21 years of age, of the fee simple and inheritance of S to him and his child or children for ever; but if he die before that time, then the fee simple and inheritance to B. for ever, (there being no child of A. in *esse*.) A. takes only an estate tail.

Davie v. Stevens. 306, 310

Executory
devise,
estate in pos-
session.

209. If there is a devise to A. and the heirs of his body, and for want of such issue to B. and A. die before the testator, leaving issue, who survive the testator; such issue shall

shall take nothing, and the limitation to B. shall not be construed an executory devise, but shall vest in possession, as an immediate estate on the testator's death.

Hedgson v. Ambrose. Page 325, 326, 330

Douglas.

Per Lord Mansfield.—The great object in questions of property is certainty; and if an erroneous or hasty determination has got into practice, there is more benefit from adhering to it, than if it were to be overturned. *Ib.*

(See *Coulson v. Coulson.* 2 Str. 1125. And *Ferne* on *Con. Rem.* 181. 249.)

210. And this although A. was the testator's heir at law.

Ib. 330, 331

211. By devise to A. for life, remainder to trustees to support contingent remainders during A.'s life, and from and after his decease; then to the heirs of his body. A. takes an estate for life with a vested remainder to himself in tail; the words "heirs of the body," being words of limitation.

Vested remainder.

Ib. 323 to 331

Per Buller, Justice.—If a testator use technical words, and also other words which manifestly indicate what his intention was; and shew to a demonstration that he did not mean what the technical words import, in the sense which the law has imposed upon them; that intention must prevail, notwithstanding he has used such technical words in other parts of the will. *Ib.*

212. A devise of all the testator's real estate in A. to B. during life, and at B.'s death to the children of B. with remainder over, gives either an estate tail to B. or an estate for life to B. with remainder in tail to B.'s children.

Estate tail for life.

Hodges v. Middleton. 415 to 418

213. An estate to A. for life by a deed, and a limitation of the same estate to the heirs of the body of A. by a will, (though the estate by the deed was voluntary and moved from the testator, and is recited in the will,) do not unite so as to give A. an estate tail, but the heirs of his body take a contingent estate by purchase.

To A. for life, by deed, remainder by a will.

Doe v. Fonnereau. 470 to 491

214. A devise

Douglas.

Executory devise.

214. A devise of a real estate to A. after a good executory devise thereof to the heirs male of the body of B. and limited on default of such issue, is a good executory devise, vested either in possession on the death of B. without leaving issue, or as a remainder after an estate tail on his death leaving issue, it is not too remote, because it must vest either in possession or as a remainder on the death of B.

Doe v. Fomereau. Page 470, 491

After failure of issue.

215. A devise after failure of the issue or heirs of A. without any previous limitation to such issue or heirs, is void in its creation. *Ib.* 488

If after a preceding limitation to such issue or heirs, it is not void. *Ib.* 484

(*Ib.* in note.)

Of personal estate in trust to heirs.

216. A devise (or conveyance in trust) of personal estate to one, and the heirs of his body, vests the whole interest in him. *Ib.*

Will of feme.

217. The will of a *feme covert*, authorized by a power in her marriage-settlement, cannot be given in evidence to shew a title to personal estate, 'till it is proved in the ecclesiastical court.

Stone v. Forsyth. 681 to 683

Revocation, change of trustee.

218. A change merely of the legal estate from one trustee to another, is not a revocation of the will of *cestui que trust*.

Doe v. Pott. 691, 692, 695

After purchased estate, codicil, republication.

219. A testator having devised all the residue of his estate, of what nature, kind, or quality whatsoever, and having afterwards purchased, and been admitted to a copyhold estate, and having surrendered it to such uses as he should by his last will and writing limit and appoint; and having then made a codicil to his will, attested by three witnesses, reciting, that having made his will, and altering some of the legacies therein, and then ratifying and confirming all and every the gifts, devises, and bequests, contained in his said will, not thereby altered; the copyhold estate passes, the codicil operating as a re-publication, and bringing the will to the date of the codicil.

Ib. 690, 691

Contingent remainders.

220. By a devise to A and B for their lives, and the life of the survivor; but in case B should marry and have issue, then after the death of A, to B and her heirs; but if B should die unmarried and without issue, then to A and her heirs.

heirs.—A and B take a joint estate for life, with contingent remainders in fee to each, in the alternative.

Goodtitle v. Billington. Page 725 to 729

Douglas.

Per Lord Mansfield.—It is perfectly clear and settled, that where an estate can take effect as a remainder, it shall never be construed to be an executory devise, or springing use.

Ib.

(Vide *Ferne* on Contingent Remainders, last edition, page 11, his distinction between such conditional limitations as are, and such as are not remainders, and his observations on Mr. *Douglas's* note in this case.)

(Vide distinctions between a *condition*, a *remainder*, and a *conditional limitation*. *Butler's* notes, *Co. Lit.* 203. b.)

221. Instances where words in a will sufficient to pass a fee-simple, are restrained by subsequent words to mean an estate-tail.

Estate-tail.

Goodright v. Dunham. 253, 254, 729

(Vide *Ferne Con. Rem.* last edit. 552.—3 *Durn*, and *Ea.* 484, & 488 in note.)

222. By this devise, viz. “I give and devise to A, her heirs and assigns for ever, all my lands at B,—and I give and bequeath to A. aforesaid, all my lands at C,—A. only takes an estate for life in the lands at C, and the reversion shall descend, altho’ the will begin with these introductory words, “For those worldly goods and estates, wherewith it hath pleased God to bless me,”—and contain a legacy of 1s. to the heir at law.

All my lands at A.

Right v. Sidebotham. 730 to 735

Per Lord Mansfield.—I believe that in almost every case’ where by law a general devise of lands is reduced to an estate for life, the intent of the testator is thwarted. Ordinary people do not distinguish between real and personal property; express limitation, or words tantamount, are necessary to pass an estate of inheritance. “All my estate,” or “all my interest,” will do, but “all my lands at such a place,” are words merely descriptive of local situation.

Ib.

223. So tho’ a will begins with like introductory words, and then the testator gives all his freehold tenement lying in G. to A. B. and C.—“to them my sister’s sons,”—and then among several pecuniary legacies leaves 10s. to his heir at law;

Id.

law; A. B. and C. take only for life, and the reversion descends. *Right v. Sidebotbam.* Page 732

Douglas.

All my lands
at A.

224. So if after a similar introduction, the testator gives all his real estate to his wife for life, and to his son P. after his wife's death, all his land at W. and among several legacies 5s. each to all his grand children, among whom were his heir at law.—P. shall only take the land at W. for life, and the reversion shall descend. *Ib.* 732, 733

All my right,
title, &c. in A.

225. By a devise of "all the right, title, and interest which I now have, and all the term and terms of years which I now have, or may have in my power to dispose of after my death, in whatever I hold by lease from Sir J. F. and also the house called the Bell Tavern,"—The fee-simple in the house called the Bell Tavern, passes. *Ib.* 733

Id.

226. "All my estate," or "all my interest," are tantamount in an express devise in fee. *Ib.* 734

Id.

227. But a devise of "all my estate at A," only passes an estate for life. *Ib.*

Disinheritance.

228. Words in a will tending to disinherit the heir at law, will not have that effect, unless the estate is completely devised to another. *Ib.*

Heir.

229. Instances where the word "heirs," shall be construed to mean heirs of the body.

Goodright v. Dunham. 253, 254, &c.

Limitation.

230. Where "heirs of the body" are words of limitation.

Hodgson v. Ambrose. 326 to 331

Purchase.

231. Where words of purchase.

Doe v. Fonnereau. 470, 491

Shelly's case.

232. Observations on the rule in *Shelly's case*. 472 to 474, 478, 480, 483, 488, 489, 490. *Ib.*

(Vide Remarks on Mr. *Douglas's* observations, *Ferns Con'ing. Rem.* last edition. page 103. The short amount of this rule is, that no man shall raise in another an estate of inheritance, and at the same time make the heirs of that person purchasers. *Ib.* 118)

233. The

Douglas.

233. The rule does not hold where the *estate for life* is in one conveyance, and the *limitation* to the heirs in another.

Doe v. Fonnereau. Page 490

(Vide *Hargrave's* observations on the rule in *Shelly's* case, 574, 575, and *Ferne on Contin. Rem.* last edit. 295.—*Butler's* notes, *Co. Lit.* 376. b.)

234. In wills, conditional limitations are all either contingent remainders, or executory devises.

Conditional limitation.

Goodtitle v. Billington. (in note) 727

235. In general, if an estate is given indefinitely, without words of limitation, an interest for life passes.

Ib. 727

1 *Durnford and East.*

236 Where the testator was seized of an undivided moiety of three tenements in A, and also of the reversion in fee expectant on the death of J. S. of the other moiety, and also seized of lands leased on lives in B, and of several other lands in C, and devised to N. P. all that his part, purpart and portion of and in the tenement called A, and also all his other lands in fee-simple, situate in B. and the reversion and remainder thereof,—the whole of the testator's estate in A, whether in possession or reversion, passed to N. P.

All lands in fee at A.

Doe on Demise Phillips v. Phillips. 105

237. A. devised lands, in trust to pay the rents and profits to his daughter (whose husband was then living,) for her life, notwithstanding her coverture, and not to be subject to the controul, &c. of her husband, nor liable to any debts which he had, or should contract; afterwards the deviser made a codicil, taking notice of the death of his daughter's husband, wherein he ratified and confirmed by his said will.—The daughter is entitled under this devise, to the rents and profits, &c. free from the controul of any future husband.

To feme, free from controul of baron.

Beable v. Dodd. 193

238. Where the testator had three sisters, (one of whom was married,) and devised lands to trustees and their heirs, in trust, that they and their heirs should during the life of the married sister receive the rents and profits, and pay the same to two other sisters, their heirs, and assigns, and from and after the decease of the husband, in case the married

Condition, limitation.

B b 2

sister

sister should be then living, to the use of the three sisters severally in thirds for life, with several remainders to their first and other sons in tail, remainders to the daughters as tenants in common, with cross remainders between the sisters on default of issue of their bodies respectively, remainder over in tail. The condition of the married sister surviving her husband is not annexed to any of the limitations subsequent to the limitation of the life estate, and the remainder man in tail may alone make a good tenant to the *precipe* upon the death of the three sisters without issue, notwithstanding the husband be then living.

Horton v. Whittaker. Page 346

1 *Durnford and East.*

Condition,
marriage.

239. Under a devise to a wife for life, provided she remains a widow, but in case she marries a second husband, then to J. S. when he shall attain his age of 23 years, the wife has an absolute estate till J. S. is 23, tho' she marry before.

Doe on dem. Dean and Chapter of Westminster, and others v. Freeman & Ux. 389

Per Ashurst, J.—It is a settled principle, that limitations in restraint of marriage are not to be favoured, wherever an estate is given to a widow for life, provided she shall not marry, unless there be a devise over *immediately*; it is merely *in terrorem*. *Ib.*

His estate at
A.

240. Where the testator gave and bequeathed to A. his estate at B. and the rest of his effects, furniture, estates, real and personal to C.—A. took the estate at B. in fee.

Holdfast dem. Cowper v. Martin. 411

Per Buller, J.—The word estate is the most general word that can be used, it is *genus generalissimum*. *Ib.*

Estate carries
a fee.

241. The word "estate" of itself carries a fee, and words of restraint must be added to make it carry less. *Ib.*

Limitation of
chattel.

242. Where there is an express limitation of a chattel by words which if applied to a freehold would create an *express* estate tail, the whole interest vests absolutely in the first taker, and a limitation over of such a chattel is too remote to take effect.

Doe dem. Lyde v. Lyde. 596
(*V. Hargrave, Co. Lit. 20. a.*)

243. But

1 *Durnford and East.*

243. But where there is no such express legal limitation, the court will consider the meaning of the testator.

Limitation of chattel.

Doe dem. Lyde v. Lyde. Page 596

244. So that where a term was bequeathed to G. L. for life, and after his decease to *Margaret* his wife for life, and after the decease of the survivor to the children of G. L. share and share alike, and if G. L. died without issue of his body, then to R. L. for life, and after his decease to *Mary* his wife for life, with remainders over—the limitation to *Mary* was held good, G. L. dying without leaving issue, and R. L. dying during his life.

Id.

Ib. 596

Per Buller, J.—A distinction has been taken, that in the case of a bequest of a term or chattel, the words “dying without issue,” shall be considered with a double aspect comprising two contingencies; the one, if the person die without leaving issue, the other if he die leaving issue, which afterwards die without issue.

Dying without issue.

Ib.

245. A devise to the right heirs of husband and wife, is a devise to such person as answers the description of heir to both, namely a child to both, and if no preceding estate be given to the father and mother, such child shall take as a purchaser.

Right heirs of baron and feme.

Roe dem. Nightingale v. Quarty. Page 630

246. Where the person to whose right heirs an estate is limited, takes no estate himself, there his right heirs shall take as purchasers.

Ib. 634

247. (V. *Ferne Conting. Rem. last Ed.* p. 87. & 455, and *Gilbert's Tenures*, 256. 3 *D. and E.* 763.)

2 *Durnford and East.*

248. Where there is an estate limited to a person for life, with remainder to the heirs of the body of same person, it is an estate tail, but the limitation of the remainder must be to the heirs of the body of that person alone; therefore if an estate be limited to A. for life, remainder to the heirs of the bodies of A. and B. it is not an estate tail.

Estate tail.

Denn v. Gillot. 435

249. If an estate be limited by deed to husband and wife, and the heirs on the body of the wife by the husband to be begotten, both have an estate tail.

Estate tail on the body.

Ib. 431

250. But

2 *Durnford and East.*

250. But if the remainder be limited to the heirs of the body of the wife by the husband to be begotten, the estate tail vests in the wife solely.

Denn v. Gillot. Page 431

Per Ashurst, Justice.—This question depends on positive determinations rather than on reasoning. If the words of this limitation had been “the heirs of the body of the wife by the husband to be begotten,” the cases would be in favor of the plaintiff, but as the word is *on*, and not *of*, all the determinations are the other way. *Id.*

Use executed,
subsequent limi-
tation.

251. A devise to trustees in trust to receive rents and profits during the life of A. and that such rents and profits shall be applied for the subsistence and maintenance of the said A. during his life, is not an use executed in A. and cannot unite with a subsequent legal limitation to the heirs of the body of A.

Silvester v. Wilson. 444

Limitation,
term.

252. If a term be bequeathed to A. and his lawful heirs, if he die and leave no lawful heirs, then to B.; the limitation to B. is good.

Goodtitle v. Pegden. 720

Per Lord Kenyon, Chief J.—A limitation over may take effect if the contingencies on which it depends must happen within a life or lives in being, and twenty-one years afterwards; but where the particular words confined it to dying without issue at the time of the death of the person to whom the bequest is made, it never was doubted that the limitation over was good.

Appurten-
ance, descrip-
tion.

253. A. being tenant for years of an house, gardens, stables, and coal pen, bequeathed in the following words, “I give the house I live in and gardens to B.” the stables and coal pen occupied by A. together with the house, passed without being expressly named, tho’ the testator used them for purposes of trade as well as for the convenience of his house.

Doe v. Collins. 498

Id.

254. By a bequest of an house, it is in general to be presumed that the testator meant to pass every thing which was occupied by him with it as proper and convenient for the occupation of the house, tho’ the word appurtenances be not added. *Id.* 502

Per

2 *Durnford and East.*

Per Buller, J.—In construing wills, we do not look at technical words so much as the testator's intention, which can only be collected from the whole will. In determining what passes under a bequest, it is material to consider the situation of the devisor.

Doe v. Collins. Page 502

255. The word "estates" in a will, will carry the fee, unless coupled with other words which shew a different intention. *Estates, carry a fee.*

Fletcher v. Smiton. 656

256. The word "estates," is equivalent to "estate."
Ib.

Per Lord Kenyon, Chief J.—The word estate may be so coupled with other words, as to explain the general sense in which it would otherwise be taken, and to confine it to mean farms and tenements—as an estate in the occupation of any particular tenant. *Ib.*

3 *Durnford and East.*

257. A devise to trustees till A. shall attain the age of 24, and when he shall attain that age, to him in fee, gives him a vested interest which will descend to his heirs, tho' he die before 24. *Vested interest.*

Doe v. Lea. H. 29 Geo. 3. 41

Per Ashburst, J.—Had the devisor used these words, "if M. L. shall attain the age of 24," that would have made it a condition precedent, and no interest would have vested in him, unless he had attained that age. *Ib.*

258. Under a devise to A. for life, remainder to his first and other sons in tail male, remainder to the use of all and every the daughters, &c. as tenants in common, and in default of such issue to the right heirs of the devisor; an only daughter took only an estate for life, on the death of A. without a son. *Estate life.*

Hay v. The Earl of Coventry. H. 29 Geo. 3. 83

259. By a devise to S. Nash, son of T. and M. Nash, for life, remainder to the trustees, &c. remainder to the first and other sons of S. Nash, and the heirs male of his and their bodies respectively, and for default of issue to the use of all and every the daughter and daughters of the said T. Nash, on the body of the said M. his wife begotten and to be begotten, and for default of such issue to the use of *Id.*

is the right heirs of the said T. And for ever; a daughter
of T. to have and enjoy an estate for life.

See L. Johnson v. Frye (cited n.) Page 89

3. Contingent and Executory

251. An estate subject on a contingency, (an executory
interest.)

See v. L. v. L. H. 29 Geo. 3. 83

Per Lord Lynd. A mere possibility is not devisable,
but a possibility coupled with an interest is. *Id.*

252. If land be devised to A. and his heirs and assigns
for ever, and if he die leaving no issue behind him, then over;
the remainder over is given by way of executory devise.

Per v. B. H. 29 Geo. 3. 143

Per Lord Lynd. Ch. J.—"Behind him" necessarily im-
ports that the estate must at the time of his son's death,
be an undivided share of the land—the case of *Per v. Brown*,
Ch. J. 5 Geo. 3. is the major share of this branch of the
law. *Id.*

Dying with-
out issue

253. There seems no difference in the construction of the
words, "dying without issue," or words to that effect,
when applied to real or personal property.

Per v. B. H. 29 Geo. 3. 146

Residue, see
by implication

254. A devise of all the real, residue, and remainder of
the testator's lands, hereditaments, goods, chattels, and per-
sonal estate, his legacies and funeral expences being therout
paid, conveys the fee of all the testator's real estate—for the
fund which is to answer those demands ought to be as ample
as possible.

See d. Palmer v. Richards. T. 29 Geo. 3. 356

Heredita-
ments

255. Whether the word "hereditaments," is sufficient
to carry a fee. *Quere.* 360

265. If an estate be devised to B. the wife of A. for
life, remainder to trustees, &c. remainder to the children of
A. and B. and their heirs for ever, to be equally divided
among them; and if but one child, to such only child, and
his or her heirs for ever, and for default of such issue, re-
mainder over, and at the death of the testator, A. and B.
have no child, the estate limited to their children is a con-
tingent remainder in fee, which on the birth of a child will
vest in that child, subject to open and let in those who may
be born afterwards, and the remainders over will be defeated
by

by that estate becoming vested. In such case the words, "for default of such issue," mean, "for default of such children." *Doe v. Perryn. M. 30 Geo. 3. Page 484*

3 *Durnford and East.*

266. An executory devise is transmissible, assignable, descendible, and devisable.

Executory
devise, devis-
able, &c.

Jones v. Roe in Error. H. 29 Geo. 3. 94, 95

267. A devise to M. L. the testator's daughter for life, remainder to the children of her body begotten, and their heirs, and in default thereof, to W. L. the testator's son in fee; M. L. died without children, after W. L.—Held W. L. took a vested remainder which was devisable in the life time of M. L.

Ives v. Legge in Chancery, 1743. 488, n.

268. A devised to B. for life, remainder to C. for 99 years if he should so long live, remainder to the heirs of the body of C. the remainder to the heirs of the body of C. was held a contingent remainder, and not an executory devise, and was defeated by C's surviving B. there being no preceding estate of freehold to support it.

Doe d. Muffell v. Morgan. T. 30 Geo. 3. 763

Per Lord Kenyon, Ch. J.—The rule laid down by lord Hale is, that where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only, and not otherwise. *Ib.*

4 *Durnford and East.*

269. A. devised to his son B. for life, remainder to trustees during B's life, to preserve contingent remainders, nevertheless to permit B. to receive the rents and profits, remainder to the first and other sons of B. in tail male, remainder to C. with a proviso that if B. should succeed to the estate of D. the limitation of A's estate to B. should cease, and the next in remainder should take as if B. were dead; B. succeeded to D's estate before he had a son. Held that the limitation to the trustees continued during the whole of B's life, so as to support the contingent remainders.

Contingent
remainder, sup-
port;

Limitations
to trustees.

Doe d. Heneage v. Heneage. M. 31 Geo. 3. 13

270. Under a devise to A. for life, and after his decease to and amongst his issue, and in default of issue then over; A. takes an estate tail.

Estate tail.

Doe d. Blandford v. Aplin. M. 31 Geo. 3. 82

271. In

4 *Durnford and East.*

General intent, particular intent.

271. In order to give effect to the deviser's general intent, the court will overlook a particular intent inconsistent therewith.

Doe d. Blandford v. Aplin. M. 31 Geo. 3. Page 82

Fee, executor.

272. A. devised his real and personal estates to his wife for life, and directed part of the personalty to be sold after his wife's death by the executor, and divided between C. D. E. F. and G. he then gave two annuities to H. and I. to be paid by his executor out of his whole estate, and to commence after his wife's death, and he then devised the remainder of the profits after his wife's death, and after the yearly payments to the annuitants out of his whole estate, to B. C. and D. equally share and share alike; held that the executor took a fee.

Doe d. Beezly v. Woodhouse. M. 31 Geo. 3. 89

Preacher of meeting-house for life.

273. A. devised to B. preacher of the meeting-house of C. for life, on condition that he should convey the premises to trustees to take place after B's death, for the use and support of the preaching the word of God, at the meeting-house for ever; and in case the preaching there should be discontinued, then over to a charity school—held that B. took an estate for life, tho' the devise over after his death would be void by stat. 9 Geo. 2. c. 36.

Doe v. Aldridge. E. 31 Geo. 3. 264

Issue, limitation, purchase.

274. Issue is either a word of purchase, or limitation, as will best effectuate the deviser's intentions.

Doe v. Collis. T. 31 Geo. 3. 294

Id.

275. Therefore where A. devised his estate to his two daughters, to be equally divided between them, one moiety to one and her heirs, and the other moiety to the other for life, and after her decease to the issue of her body and their heirs for ever, and she had one child living at the time of the devise; the second took only an estate for life, with a remainder to her children as purchasers. *Id.*

To A. and his heirs, limitation defeated.

276. Under a devise to A. and his heirs, but if he die without settling, or disposing of the same, or without issue, then over; A. may settle the estate in his life-time, and defeat the limitation over.

Beachcroft v. Broome. M. 32 Geo. 3. 441

Death of devisee, in life-time of deviser.

277. A. devised to B. and the heirs of her body, and for default of such issue, then over; B. died in the life-time of A. and then A. by a codicil confirmed his will; held that the heir of B. took nothing, tho' it appeared that A. knew of the

the death of B. and of the birth of her son, before he made the codicil.

Doe d. Turner v. Kett. E. 32 Geo. 3. Page 601

4 *Durnford and East*

278. The codicil operated as a re-publication of the will, and then it stood thus:—A devise to B. and the heirs of her body, but B. being dead, the devise was void. Death of devisee in life-time of devisor. *Ib.*

279. Under a devise to A. and B. and their heirs, and in case they agreed to sell the estate, that they should have their equal shares of the money arising therefrom; but if they agreed to keep the estate whole together, then that the rents should be equally paid, and divided between them, and to the several and respective heirs of their bodies.—A. and B. took only estates tail. Estate-tail.

Roe d. James v. Aves. E. 32 Geo. 3. 605

280. A. being seised in fee tail of an undivided fourth part of an estate, and entitled to the reversion in fee of another fourth, expectant on the determination of an estate tail, recited, that she was entitled to the first; and devised it to B. C. in fee, and then directed all the residue and remainder of her estate and effects to be sold, as soon as might be, after her death, and her funeral expences to be paid thereout, and the overplus, (if any), to be divided between D. and E.—it was held that the reversion did pass by these general words. Reversion, general words.

Roe d. James v. Avis. E. 32 Geo. 3. 605

281. A. bequeathed money to trustees in trust for B. till she should attain twenty-one years, and then to pay the same to her; and if B. should die under twenty-one years, leaving child and children; but if B. should die under twenty-one, without leaving any child or children, then in trust for C.'s three nieces, B. attained twenty-one years, married, and had two children, and died in the life-time of the testatrix.—B.'s children took nothing by the will. Death of devisee in life-time of devisor.

Doo v. Brabant. Trin. 32 Geo. 3. 706

282. A. devised to all and every the daughter and daughters of the body of B. and the heirs male of the body of such daughter or daughters, equally between them, if more than one, as tenants in common, and for default of such issue (he devised), all his said lands to C.—Held that the daughters of B. took cross remainders. Cross-remainders.

Atherton v. Pye. Trin. 3 Geo. 3. 710

283. The

Cross remain-
ders.

4 *Durnford and East.*

283. The rule is, that as between two only, it shall be presumed that cross remainders were intended to be raised; but if there be more than two, it is necessary to resort to other words in the will, to discover an intention to raise them.

Atherton v. Pye. Trin. 3 Geo. 3. Page 713

And here the testator clearly intended cross remainders between more than two.

Estate-tail,
estate limited,
remainder in
tail.

284. A. devised to B. his wife for life, and impowered her to devise the same to any one of more or her child or children, in such manner, share and proportion, as she should appoint, "but so as the said estate should not be divided, but transmitted whole and entire to his heirs;" and in another part, (after devising an adjoining estate in the same way), he added that his will was, that "they should be considered as one estate, and be transmitted entire to his family;" and in default of appointment, to his own right heirs. B. by will devised and appointed to their son C. for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of C. in tail general, remainder to the daughters of C. in tail general, and with like limitations to D. and E. two other children;—all the children, C. D. and E. were alive when A. devised; *quere*, what estates did they severally take?—*Per Lord Kenyon*, Ch. J. and *Grose J.* they respectively took estates in tail general.—*Per Ashurst & Buller J.* they respectively took life estates, with remainders in tail to their respective children. *Griffith v. Harrison.* 737

Vernon and Scriv.

Personal estate
exempt from
debts.

285. Testator by his will makes several devises, and bequeaths to his wife, whom he thereby appoints his executrix and residuary legatee, and directs a certain part of his real estate to be sold, to pay his debts and legacies, in case his personal estate should be insufficient; afterwards his property being considerably increased, he by a codicil devises lands to his wife during widowhood, "which lands," says he, "are to be free from all incumbrances, and I charge and incumber all my real and freehold estates, except the lands before named in this codicil, with all the debts I owe by bond, judgment, or other specialty, and direct that my executrix shall pay my simple contract debts, and arrears of rent, out of my personal estate." The personal estate is exempted from the payment of all debts, except simple contract debts, and arrears of rent;—decreed contra in the Exchequer, 319. Decree reversed by the Lords.

482
286. Parol

Verdon and Scriv.

286. Parol evidence is not admissible, to shew that it was the testator's intent to exempt the personalty from the other debts. Parol evidence.
Page 327, 328, 482

287. In pleading a devise, it is sufficient to state that the testator "duly made and published his last will and testament in writing," without stating the solemnities required by the statute of frauds. Pleading, devise.
497

Hen. Blackstone.

288. A possibility coupled with an interest, is devisable. Possibility coupled with an interest.
Roe on the demise of Perry v. Jones. Trin. 28 Geo. 3. 30

N. B. The judgment in this case was affirmed by the court of King's bench, on a writ of error.
Hil. 28 Geo. 3. See 3 Term Rep. B. R. 88

289. Where there is a devise to A. of "all and every" the testator's several lands, messuages, tenements and hereditaments whatsoever, whereof he was seized and interested in, or intitled to," with a specific bequest of his personal estate to B.—A. does not take leasehold lands, but they go to B. as part of the personal estate. Leasehold lands, personal estate.

Pistol on demise of Randal v. Ricardson. Hil. 25 Geo. 3. B. R. 26. n.

290. A devise of "all the rest and residue of my estate, of what nature or kind soever," includes real as well as personal property, though accompanied with limitations peculiarly applicable, and usually applied to personal property alone. Rest and residue, real and personal.

Doe on demise of Burkitt and others v. Chapman. East. 29 Geo. 3. 223

291. *Quere*, whether in a devise the words "estate of what kind soever," immediately preceded and followed by particular descriptions of personal property, will pass a remainder in fee of lands vested in the testator. Estate, remainder in fee.

Dally v. King. East. 28 Geo. 3. 3

2 *Hen. Blackstone.*

292. Where there is a devise to A. for life of the rents and profits of a real estate, and the interest and dividends of personal property, and after his death the whole estates both real and personal, to be divided between B. and C. the executors and trustees are bound to pay to A. the annual produce of the personal as well as real property, (especially if the Rents and profits.

Executor, receipt.

the personal property be money in the funds,) without requiring a receipt stamped as for a legacy; such annual payment not being subject to the tax imposed on legacies. *Quere* whether in any case an executor can refuse to pay a legacy until a receipt or discharge be given.

Green v. Croft and others. Page 30

2 *Hen. Blackstone.*

Two legacies, same sum, codicil.

293. Where two legacies of the same sum are bequeathed to the same person by different instruments, *viz.* one in a will, and the other in a codicil, the legatee is intitled to both unless there be some circumstance to shew that the intent of the testator was that he should take but one.

James v. Semmens Widow. 213

Power of appointment.

294. A bond conditioned for the payment of a sum of money to such person as A. B. shall by will appoint, is not forfeited by non-payment to the residuary legatee of A. B. no specific appointment having been made. A power of appointment by will is not executed by a mere devise of the residue.

Bushland Executor of Elizabeth Barton v. Barton.

136

Distress.

Distress.

1. **T**HE remedy for recovery of rent, by way of distress, came to us from the civil law,—for anciently the non-attendance in the lord's court was punished with the forfeiture of the estate; this forfeiture was afterwards turned into distress, that is, the land was considered as a pledge in the hands of the tenant, to answer the rent, and the whole profits are liable to the lord's seizure.

Origin of.

Gilbert on Rent. Page 3

2. As the power of seizure, so the distress that was substituted in its place, belonged only to him to whom the lands must return when the feudal donation is spent; therefore a stranger grantee of a rent could not distrain, unless the reversion had been granted to him. *Ib.* 7

Id.

3. All distresses must be made the day, except for damage feasant—the distress (by 8 *Ann.* c. 14.) may be made within six months after the determination of the lease whereon rent is due; the remedy for excessive distresses is by special action on the statute of *Marlbridge*, for it is no injury at common law.

When made.

3 *Black. Com.* 12

4. All chattels personal are liable to be distrained, unless particularly exempted; as, 1. *feræ naturæ*.—2. Things in personal occupation, as a horse while a man is riding him, unless damage feasant.—3. Things in the way of trade, as cloth of taylor's, &c.—4. Tools and utensils of trade.—5. Things which cannot be rendered in the same condition; but now, by 2 *W. & M.* c. 5. corn in cocks or loose, or hay, &c. may be distrained.—6. Lastly, things fixed to the freehold; but now by 11 *Geo.* 2. c. 19. corn, grass, or other products of the earth may be cut and gathered when ripe.

Things distrainable.

Ho't.

5. On avowry for rent, it is not traversable whether A. was bailiff or not.

Whether bailiff, not traversable.

— *v. Goudier.* 256

5

6. Where

Holt.

Beast distrained escapes distrainer, pound keeper.

6. Where a beast distrained damage feasant escapes, whether the party afterwards may bring trespass—the distrainer may be his own keeper of the pound, and every pound keeper is the servant of him who impounds the cattle.

Vasper v. Eddowes. Page 256

Seizure of some goods for all;

7. A seizure of some goods as a distress for rent, in the name of all the goods in the house, is a good seizure of all.

Dod v. Monger. 416

Riens in arriere, payment.

8. On *riens in arriere* pleaded, nothing is to be given in evidence but payment or not payment.

Willet v. Waxcomb. 567

Salkeld.

Things distrainable.

9. What things are distrainable or not.

Vinkestone v. Edden. 249

Sails of ship.

10. An anchor and sails of a ship are distrainable for port duties.

Ib. 248, 249

Goods to be manufactured.

11. Yet goods delivered to a tradesman to be manufactured, are not distrainable for rent.

Gisbourn v. Hurst. 250

Goods delivered to carrier for hire.

12. Nor goods delivered to a common carrier that carries them for hire.

Ib. 249

Distress without cause, rescue.

13. Where distress is without cause, the owner may rescue before impounding, not after.

Cotsworth v. Bettison. 247

Distress escapes, trespass.

14. Where a distress escapes, a distrainer cannot bring trespass, unless shewn to be without his default.

Vasper v. Eddowes. 248

Distress dies.

15. But if the distress dies after taken, he may have trespass for damage feasant, for being the act of God, the party is not deprived of his remedy.

Ib.

Distress for publick benefit, officer sells.

16. Where the law gives a distress for publick benefit, the officer may sell.

King v. Speed. 379

In two hundreds.

17. On a distress in two hundreds in different counties, the oath on sale may be administered by the constable of either.

247

18. In

Salkeld.

18. In case of rescue, plaintiff shall recover treble costs and treble damages.—v. Stat. 2 *W. & M.* f. 1. c. 5.

Lawson v. Storie. Page 205

19. Notice to the owner of the goods distrained is sufficient.

Notice to owner of goods.

Walter v. Rumbal. 54

1 Letd *Raymond.*

20. Distress taken in two counties may be appraised by authority of the office in one county.

Goods taken in two counties appraised.

Id. 55

21. Distress taken in two places for one cause ought to be impounded together.

In two places impounded together.

Id.

22. Lands in two counties not contiguous, are demised together, a distress taken in one county cannot be driven into the other.

Lands in two counties not contiguous.

Id.

23. A distress sold at the appraised price, shall be intended to be sold at the best price.

Sold at appraised price.

Id.

24. A tortious distress may be rescued before it is impounded, but not after, because the distress is then in the custody of the law.

Tortious distress rescued.

Catworth v. Betison. 105

25. Cattle driving to market and put into pasture by the way, are not privileged from being distrained; for it is by the statute *J. Mart.* that beasts cannot be distrained in the highway, and not by the common law.

Fowkes v. Joyce. 2 *Vent.* 50

26. Where cattle escape into ground without the default of the owner, they are not distrainable for rent until they are *levant and couchant*.

Cattle escape *levant and couchant*.

Kempe v. Greus. 169

27. A lease is made for two years and farther at will; whether the lessor may distrain for the rent of the two years during the estate at will.

Lease at will.

Bellasis v. Burbrich. 171, 280

28. Executor of tenant for life of a rent charge, may distrain by 32 *Hen.* 8. c. 37.

Tenant for life, rent charge.

Hool v. Bell. 173

- Cattle of stranger not tenant and couchant.** 1 Lord Raymond.
29. If cattle of a stranger not *levant* and *couchant*, are liable to distress for a rent charge.
Kempe v. Crew. Page 169, 308
- Averia carucæ.** 30. The *averia carucæ* are privileged against distress for rent, where there is other sufficient distress.
Vinkensterne v. Edden. 385
- Cattle distrained, return irrepleviable.** 31. Cattle distrained for rent must be returned upon payment, though return irrepleviable hath been awarded.
Horne v. Levin. 643
- Tender of damages.** 32. On tender of damages, a distress ought to be discharged.
Vasser v. Eddowes. 719
33. (Formerly any irregularity rendered the party a trespasser, *ab initio*—now by stat. 11 Geo. 2. c. 19. the party aggrieved shall only have an action for the real damage sustained, and not even that if tender of damages is made before any action brought. 3 *Black. Com.* 15.)
- Witbernem, tender of damages.** 34. *Witbernem* staid on tender of damages assessed.
Ib. 720
- Detinue.** 35. *Detinue* for detaining a distress when the arrears are tendered after return irrepleviable.
Ib.
- Cattle distrained, tried.** 36. Cattle distrained may not be tried.
Ib.
- Dies or escapes.** 37. No action lies after a distress for the same cause, unless the distress dies or escapes through the defendant's default.
Ib. 720
- Removal of.** 2 Lord Raymond.
38. If the landlord does not remove the distress in reasonable time, he is a trespasser *ab initio*.
Griffin v. Scott. 1424
- Id.** 39. The landlord must remove the distress at five days end, or he is a trespasser.
Ib. 1424
- Excessive distress.** *Sir age.*
40. Trespass does not lie for taking an excessive distress.
Lynne v. Moody. 851
41. It

Strange.

41. It is but in the nature of a pledge—the remedy ought to be by special action on the statute of *Marleberge*. *Ib.*

42. Where two parcels of land are distinctly let, there cannot be a joint distress for both rents.

Rogers v. Birkmire.

Page 1040

Distinct parcels of land, joint distress.

43. Impounding in another county does not make a trespasser.

Gimbart v. Petah.

1272

Impounding in another county.

Hardwicke.

44. If the outward door is open, a party distraining may justify the breaking the inward door to take a distress.

Browning v. Dunn.

158

Enter door open, breaking inward door.

2 Wils.

45. Lessee for years assigns his term, he cannot distrain for rent.

— v. *Cooper.*

375

Lessee for years, assigns, cannot distrain.

1 Blackstone.

46. A carriage standing at livery is distrainable for rent by the lessor of the premises.

Francis v. Wyatt, T. 4 Geo. 3.

483

Carriage at livery.

2 Blackstone.

47. An annuitant may distrain for arrears, though a term be vested in himself to secure the payment, the reversioner (in possession) being considered as his under tenant.

Fairfax v. Gray.

1326

By annuitant.

1 Burr.

48. *Averia carucarum*, are distrainable under 43 *Eliz.* for poor rates, and under such like acts of parliament, although there be other goods more than sufficient to answer the value.

Hutchins v. Chambers.

587, 588

Averia carucarum.

49. The distinction is, that such seizures for such duties are but partly analogous to the common law distress, but much more analogous to common law executions. *Ib.* 588

Id.

50. Common law distresses were to compel payment, were only detained *nomine pæne*, and could not be sold: whereas these are by way of satisfaction for the debt, are distresses in execution, and are to be sold outright and almost immediately.

Purpose of common law.

Ib.

1 *Burr.*Purpose of
common law.51. The statute of 51 Hen. 3. &c. "*distractione scaccarii*,"
does not extend to these.*Hutchins v. Chambers.* Page 588Exceptions,
utensils, &c.
does not extend
to distress under
statute, execu-
tion.53. The common law exemption of utensils, tools, im-
plements of husbandry, &c. from distress, holds only in dis-
tress for rent arrear, amerciaments, &c. but doth not ex-
tend to the cases where a distress is given in the nature of
an execution by any particular statute (as for poor rates, &c.)
*Ib.*Apportionment
of.53. Distress for an entire duty shall not be split, and a
distress taken for part of the entire sum at one time, and
for other part of it another time, (for that is great oppres-
sion.)
Ib. 589

Second seizure.

54. If the seizure be at first for the whole, and only the
value of the goods mistaken, the execution may be com-
pleted by a second seizure, provided it be for the same
sum due.
589, 590Excessive
distress.55. A general action of trespass cannot be maintained
for taking an excessive distress, the remedy ought to be by
a special action founded on the statute of *Marlbridge*.
Ib. 59056. The administrator of the landlord cannot distrain
under 8 of *Ann.*
589Things ex-
empted.3 *Burr.*57. What things belonging to third persons are exempt-
ed from being distrained, and what of them are liable to it.*Francis v. Wyatt.* 1498 to 150458. Exempted things were said (*arguendo*) to be a horse
at an inn.
*Ib.*59. A horse at a farrier's left to be shod. *Ib.*60. A horse that brings goods to market to be sold. *Ib.*61. The goods themselves so brought to market. *Ib.*62. Goods on a wharf or at a warehouse for exportation.
1498 to 1504Goods in the hands of a factor. *Ib.*

Goods

Burr.

Goods delivered to a carrier to be carried for hire.

Ib.

Wool in a neighbour's barn.

Ib.

Cloth at a weaver's.

Ib.

Cloth at a taylor's.

Ib.

63. Not exempted,

Things not
exempted.

Goods left at an inn, and also,

Ib.

A gentleman's chariot standing in a coach-house belonging to a common publick livery stable-keeper, and being parcel of and rented with the livery stables by the livery stable keeper of his landlord, who thus distrained it so standing at livery for rent due to him from the stable-keeper.

Ib.

Cotter.

65. Cannot be made for the toll of goods fraudulently sold out of a market to avoid the toll, but the party injured must bring a special action on the case.

Toll of goods
fraudulently
sold.

Blakey v. Dinsdale.

661

66. Where a distress was tortiously taken and impounded; action does not lie against those who took the distress, and the pound keeper jointly; for he acted ministerially.

Badkin v. Powell.

476

67. An action for money had and received, does not lie to recover back money paid for the release of cattle damage feasant, though the distress were wrongful.

Release of
cattle, money
had and received.

Lindon v. Hooper.

417

68. *Per Lord Mansfield.*—Distraining cattle doing damage, is a summary execution in the first instance. The distrainer must take care to be formally right; he must seize them in the act, upon the spot; for if they escape or are driven out of the land, though after view, he cannot distrain them.—The law has provided two precise remedies for the proprietor of cattle which happen to be impounded.

Remedies for
cattle impounded.

—First, he may replevy, and if he does, upon the avowry he must specially set out a right of common or some other title as a justification of the cattle being where they were taken,—or second, if he is desirous to have his cattle immediately re-delivered, he may make amends, and then bring an action of trespass for taking his cattle, and particularly charge the money so paid by way of amends, as an aggravation of the damage occasioned by the trespass; if to such an action the distrainer pleads that he took them doing damage,

damage, the plaintiff must specially reply the right or title which he alledges the cattle had to be there.

Lindon v. Hooper. Page 417

Deagl.

69. A demand is necessary before a landlord can enter for non-payment of rent.

Goodwright v. Cator. 456, 459

Unless where six months rent is in arrear, and there is not a sufficient distress on the premises. *Ib.*

Or unless the necessity of a demand is waived by the tenant by express agreement. *Ib.* 469

Grantee or mortgagee, attornment.

70. A grantee or mortgagee since 4 Ann. c. 16. s. 9. may distrain before he has turned his right into equal possession by the attornment of the tenant.

Moss v. Gallimore. 267

Not incident to fee farm rent, as such.

71. Distress is not incident to a fee farm rent as such, unless the case is brought within 4 Geo. 2. c. 28.

Bradbury v. Wright. 604

Notice for sale of.

72. In the notice for the sale of a distress under 2 Will. and Mary, c. 5. it is not necessary to mention when the rent became due, for which the distress has been made.

Moss v. Gallimore. 268

1 *Darnford and East.*

Sum over and above rent towards good will.

73. An agreement between the lessor and the assignee of the original lessee, "that the lessor should have the premises as mentioned in the lease, and should pay a particular sum over and above the rent annually, towards the good will already paid by such assignee," operates as a surrender of the whole term, and the sum reserved for good will, is to be paid annually in gross, not as rent; and the assignee cannot distrain either for that or for the original rent, but he has a remedy by *assumpsit* for the sum reserved for the good will.

Smith v. Mapleback. 441

3 *Darnford and East.*

Removing goods to prevent distress.

74. An averment in a declaration on 11 Geo. 2. c. 19. s. 3. to recover double the value of goods removed in order to prevent distress, that fifty-seven pounds was due for rent before the goods were removed, need not be precisely proved as laid.

Grinnet v. Phillips. 643

75. Nor is the notice of distress which alledges a different sum to be due, material. *Ib.*

Implements of trade, weaving looms, no other articles.

4 *D. & E.*

76. Implements of trade, as weaving looms, may be distrained for rent, if they be not in actual use at the time, and if there be no other sufficient distress on the premises.

Gorton v. Falkner. Hil. 32 Geo. 3. 569

77. 20

4 Darnford and East.

77. So may beasts of the plough under the same circumstances.

Gorton v. Falkner. Hil. 32. Geo. 3. Page 565

Beasts of
plough, no
other distress.

78. But things affixed to the freehold, such as an anvil, or millstone, cannot be distrained.

Ib. Things affixed
to freehold.

79. Things delivered to persons exercising their trade, such as cloth in a taylor's shop, are not distrainable.

Simpson v. Harcourt. Mich. 18 Geo. 2. cited. 569

Things
delivered in
trade, cloth to
taylor.

80. *Per Buller, J.*—Five things by common law are not distrainable,—First, things annexed to the freehold,—Second, things delivered to persons exercising their trade, as cloth to a taylor, &c.—Third, corn, hops, &c. growing,—Fourth, instruments of the plough,—Fifth, instruments of trade.

Things not
distrainable.

81. The three first were absolutely privileged; the two last only *sub modo*,—as to the first they are not distrainable at this day, nor was corn distrainable before the statute of *W. & M.* and the reason was, because they cannot be restored in the same plight they were in when taken. *Ib.*

82. (By stat. 11 Geo. 2. c. 19. landlords may distrain corn, grass, or other products of the earth, and cut and gather them when ripe;—they may distrain goods of the tenant carried clandestinely off the premises within thirty days, unless *bona fide* sold;—with the assistance of a peace officer, may break open places locked up to prevent distress, on affidavit of reasonable ground of suspicion.—By 8 Ann, c. 14. landlord may distrain six months after the determination of the lease.—3 Bl. Com. 9. 11.)

Hen. Blackstone.

83. Where there is a custom, that a tenant may leave his away going crops in the barns, &c. of the farm for a certain time, after the lease has expired and he has quitted the premises, the landlord may distrain the corn so left for rent arrear, after six months have expired from the determination of the term.

Beavan v. Delahay and another.—East. 28 Geo. 3. 5

See *Lewis v. Harris. Cor. Skynner, Cb. Baron*, summer assizes at Hereford,—18 Geo. 3. 7n.

84. Action on the case for selling goods distrained for rent in arrear, before five days had expired next after the distress was taken, and notice given—distress and notice of sale

sale were the twelfth *May*, goods were sold seventeenth, — *Per Cur.* The days allowed before a distress can be sold are inclusive of the day of sale, therefore the five days had completely expired on Thursday the seventeenth afternoon. — Trover will not lie for goods taken under an irregular distress since the statute 11 *Geo.* 2.

Wallace v. King. Page 13

Hen. Blackstone.

Distress for
rent, waiver of
notice.

85. A distress taken for rent accrued after the expiration of a notice to quit, is a waiver of the notice. — *Zouche on the Dem. of Ward v. Willingale, Hil. 30 Geo. 3.* 311

86. By the 8 *Ann.* c. 14. s. 6 and 7. A distress may be taken within six months after the determination of a lease, provided the interest of the landlord and the possession of the tenant continues. *Ib.*

Administrator,
testator dies
before expira-
tion of term.

87. Where the lessee of lands dies before the expiration of the term, and his administrator continues in possession during the remainder, and after the expiration of it, a distress may be taken for rent due for the term. — *Brathwaite v. Gookby and another. Trin. 30 Geo. 3.* 465

Dower.

Salk.

A TENANT for life, remainder for years, remainder to A in tail, A's wife shall be endowed.

Bate's Case. Page 254

2. But otherwise if the mesne remainder had been for life. *Ib.*

3. Detinue of charters is no plea in dower after imparlance.

Burden v. Burdon. 252

4. Tenant in dower dies before writ of enquiry executed, administrator cannot bring a *scire facias* for the damages and mesne profits. *Ib.*

5. Lord Raymond.

5. Cannot be decreed in Chancery, but ought to be pleaded as assigned by the heir.

Smith v. Angell. 785

6. A recovery in dower will estop the tenant and all claiming under him, from giving a prior term to a stranger in evidence.

Booth v. Marquis of Lindsey. 1293

7. Dower does not lie to tenements.

Kerry v. Kent. 1384

Hardwicke.

8. Where a remainder in tail or fee comes to or descends on tenant for life, either by his own act or the operation of law, the two estates are so consolidated, that it should seem the intermediate contingent estates are destroyed, or if they do open on the contingencies happening, they are suspended till that time, and the wife of the tenant for life with such remainders shall have dower.

Hooker v. Hooker. 11

9. Damages

Hardwicke.

9. Damages are given in dower from the death of the husband, and to the return of the writ of enquiry, though the writ of seisin issued a year before but was not executed.

Dobson v. Dobson. Page 17

10. On a writ of dower, damages cannot be awarded by the 18 C. 2. *Eng.* without speeding a writ of enquiry.

Kent v. Kent. 46

¶ *Tiedment.*

Ejectment.

1. **T**HE remedy by ejectment is in its original an action brought by one who hath a lease for years, to repair the injury done him by dispossession; in order therefore to convert it into a method of trying titles to the freehold, it is first necessary that the claimant do take possession of the lands, to empower him to constitute a lessee for years that may be capable of recovering this injury of dispossession; when therefore, a person who hath a right of entry into lands, determines to acquire that possession which is wrongfully withheld by the present tenant, he makes (as by law he may) a formal entry on the premises, and being so in possession of the soil, he there upon the land, seals and delivers a lease for years to some third person or lessee, who remains until the prior tenant, or some other person ousts or ejects him; for this injury the lessee is intitled to his action of ejectment to recover back his term and damages; a re-entry by the landlord, by Stat. 4 Geo. 2. c. 28. is unnecessary now, where half a year's rent is due and no distress is to be had; four points are necessary to be made out in case of a defence:—title, lease, entry and ouster. By the common rule the lease for a term of years from the lessor of the plaintiff is admitted; secondly, that the lessee or plaintiff did enter or take possession in consequence of such lease; and lastly, that the defendant ousted or ejected him. The thing to be proved is a good title in the lessor.

Definition,
general nature
of.

2. This action is calculated to try the mere possessory title to an estate. This mixed proceeding is infinitely more convenient for the ends of justice, than those real actions which have fallen into disuse; being entirely fictitious, it is wholly in the power of the court to direct the application of that fiction, so as to prevent fraud and chicanery, and to eviscerate the very truth of the title.

Possessory
title.

3. On those things whereon an entry cannot be made, no entry shall be supposed, by any fiction of the parties; as in corporeal hereditaments, except for tithes, by statute 32 Hen. 8. c. 7. nor will it lie in such cases where the entry of him that hath right is taken away by descent, discontinuance, twenty years dispossession, or otherwise.—3 Black. Com. 201, 205.

4. The

Descent.

4. The descent which tolls an entry is where disseisor dies seised of the fee (whether simple or in tail) and the freehold, *Lit. sect. 388.* — unless he be seised of both, the entry is not tolled, *ib.* and such descent may be either lineal or collateral. *Lit. sect. 389.*

5. But the entry is not tolled, if he who had the right, was during the disseisor's life under legal disabilities, either by infancy, coverture, imprisonment, insanity, or absence from the kingdom. See also other cases. *Litt. b. 3. c. 6.* And now by 32 *Hen. 8. c. 2.* no descent shall take away the entry, unless the disseisor had peaceable possession five years next after the disseisin.

6. With respect to discontinuance, it happens whenever tenant in tail in possession makes an estate of the lands which exceeds his legal powers, *Co. Lit. 327. 332.* And such tenant in tail may discontinue by five several kinds of conveyance; 1st, fine; 2d, recovery; 3d, feoffment; 4th, release; 5th, confirmation. *Co. Lit. 325.* But an exchange works no discontinuance, for no livery is requisite thereupon, *Co. Lit. 322.* Nor is bargain and sale in fee a discontinuance, for it only passes a freehold determinable within a life. *Moor 42.*

7. As to the five conveyances which work a discontinuance, by the two first, *viz.* fine and recovery, no discontinuance is wrought, if tenant in tail dies before execution, *Roll. Abr. 632.* The third (feoffment) is a discontinuance with or without warranty; but the 4th and 5th (release and confirmation) pass no more than they lawfully may, and therefore do not enure as a discontinuance, unless a warranty be added, and descend on him that hath the right. *Co. Lit. 328. b.*

8. None can make a discontinuance larger than the alienation of the tenant in tail who made it; therefore if A. tenant in tail, make a gift in tail to B. and B. enfeoff C. and dies without issue, the issue of A. may enter. *Co. Lit. 327.*

9. Note also that if the estate that caused the discontinuance be defeated (as by entry for a condition broken) the discontinuance is defeated also. *Co. Lit. 356.*

10. Discontinuance takes away the heirs, because the entry of the alienee was originally lawful; but entry is not taken away by mere disseisin without descent, nor by abatement which intercepts the inheritance from the heir or devisee,

see, nor by intrusion which intercepts the remainder man
reversioner, for in each case the entry of the wrong doer
is originally unlawful.

but.

11. Lies not of twenty acres of arable and pasture, with-
out shewing how much of each.

Description.

Knight v. Syme. Page 263

12. Uninterrupted possession of twenty years before B.
his possession is a good title in the plaintiff in ejectment, it
gives a right of possession, and is like a descent which tolls
entry.

Twenty years
possession.

Stokes v. Berry. 264

13. The landlord if he desires it may be joined a de-
fendant with the tenant in possession, otherwise not.

Landlord,
defendant.

Underhill v. Durham. 264, 265

14. Confession of lease, entry and ouster, first ruled good
in ejectment by Lord Hale in 25 Charles 2.

Common
rule, when
introduced.

Little v. Heaton. 264

15. Actual entry may be necessary to complete a title in
the lessor of the plaintiff, and in such case entry is not con-
fessed by this rule, but only the entry of the nominal plain-
tiff, and therefore in such case plaintiff must prove an actual
entry by his lessor.

Actual entry.

Ib.

16. Ejectment was at common law a remedy for the
termor for years, and if he recovers, it binds the right and
interest of him that has the inheritance,

Walbert v. Harris. 265

17. A *scire facias* is as necessary in an ejectment as in
any other real action.

Scire facias.

Ib.

18. Who may or may not falsify on a judgment in eject-
ment.

Judgment
falsified.

Ib.

19. The defendant after a recovery against him, must
quit the possession before he shall bring an ejectment.

Recovery
against defend-
ant, ejectment
by him.

Fenwick v. Grosvenor. 266

20. The rule for judgment against the casual ejector is
in the power of the court, upon what terms the court think
fit.

Rule for
judgment,
terms discre-
tionary.

Ib.

21. Course at the trial, if the defendant will not appear
and confess lease, entry and ouster, is to call the defendant,
and then call the plaintiff and non-suit him.

Defendant not
appearing.

Ib.

- Holt.*
 Release by plaintiff. 22. The plaintiff in ejectment is but a feigned trustee for the lessor, and if he releases he is of a contempt.
Anonymous. Page 267
- Plaintiff, real person. 23. The plaintiff, or lessee, ought to be a real person, &c. &c.
- Estoppel. 24. Ejectment maintainable upon an estoppel, which runs with the lands; but an estoppel in pleading does not bind the jury, unless it works upon the interest in the lands.
Trevilian v. Lawrence. 282
- Venue. 25. *Venue* in ejectment to come from the place where the lands lie, and not where the demise is said to be made.
Gree v. Sharp. 404
Salkeld.
- Entry where proof of. 26. Where an entry is requisite to complete the title of lessor of plaintiff, that entry is not confessed by the general rule, but only the entry of the nominal plaintiff. The rule only confesses that the lessor made a lease, but not that he had a power so to do.
Little v. Heaton. 259
- Entry without expulsion. 27. A bare entry on another, without expulsion, makes only such a seisin that the law will adjudge him in possession only who has the right, but will not work a disseisin or abatement without actual expulsion.
Anonymous. 246
- Twenty years. 28. Twenty years possession is a good title in the plaintiff, as well as the defendant.
 29. It is like a descent which tolls an entry, and gives a right of possession, which is sufficient to maintain an ejectment.
Stokes v. Berry. 421
- Empty house. 30. In ejectment for an empty house, a lease is to be sealed in the same, and entry, &c. made.
Smartly v. Henden. 255
- Wife of lessor defendant. 31. A wife may be made defendant in ejectment, where the husband is lessor of the plaintiff.
Fenwick's Case. 257

Salkeld.

32. The statute of limitations never runs against a man but where he is actually ousted or disseised, and though one tenant in common may disseise another, it must be done by actual disseisin, not by the bare perception of profits only. Where two men are in possession the law will adjudge it in him who has the right; a man may be tenant in common by prescription, yet he may not be tenant in common by wrong; nor can a man be disseised of an undivided moiety. If a man be seised of the whole and makes a lease to another of a moiety undivided, and a stranger ousts the lessee, he must bring his ejectment of a moiety; and so if they be both ousted, they must bring several ejectments.

Actual disseisin.

Reading v. Royston. Page 423

(Vide *Hatcher v. Fineaux.* 1 Lord Raym. 740.)

33. The possession of one joint-tenant is the possession of the other, so far as to prevent the statute of limitations.

Possession of one joint tenant.

Ford v. Grey. 285

(V. *Fairclaim v. Shackleton.* 5 Burr. 2604. Co. Lit. 1956.)

34. Mortgagee covenants, that mortgagor shall quietly enjoy until default of payment, and assigns after assignment. Mortgagor is only tenant at sufferance; but his continuing in possession does not make a disseisin or divesting of the term. The entry laid and confessed by the defendant is not a real entry, for it shall neither avoid a fine, nor be sufficient evidence to support trespass for the mesne profits.

Mortgagor, tenant at sufferance, entry.

Smartle v. Williams. 245

35. On *elegit*, if the sheriff deliver more than a moiety, the execution is void, and an ejectment cannot be maintained.

Elegit, more than moiety.

Putten v. Purbeck. 563

1^o Lord Raymond.

36. On a demise of a corporation without mention that it was by deed, is good after verdict.

Demesse, corporation without deed.

Partridge v. Ball. 136

37. *Per Holt.*—The case of 2 Cro. 613. *Swadling v. Piers*, at this day is not law, for now ejectments are grounded on fiction.

38. Two demises in an ejectment good, with one *habendum*.

Two demises, one *habendum*.

Slabourne v. Bengo. 561

39. Co-

1 Lord Raymond.

Separate
join.

39. Coparceners may join in the lease in ejectment.

Bonar v. Juner. Page 726

Demise, time
to come.

40. Demise in ejectment laid at a time to come, but tenant had entered into the common rule. Court compelled him to confess lease, &c.

Anonymous. 728

One of two
defendants con-
fesses, &c.

41. Joint defendants.—One appears and confesses, &c. the other makes default; verdict for plaintiff against the one who confessed, and against the plaintiff for the other who did not. Plaintiff recovers all the lands notwithstanding.

Claxmore v. Searle. 729

Twenty years.

42. Possession for 20 years in A. then B. gains possession. A.'s possession for twenty years by virtue of the statute 34. 1. is like a descent which tolls the entry.

Stocker v. Bern. 741

By mortga-
gee not in pos-
session for
twenty years.

43. Where a man made a mortgage as a collateral security, though the mortgagee is not in possession for twenty years and more, yet if the interest be paid upon the bond, the statute of limitations shall not be a bar to an ejectment by the mortgagee.

(*Per Holt.*)

Hatcher v. Fincum. 740

Entry, *cestui*
que, statute limi-
tations.

44. Entry of *cestui que trust*, avoid the statute of limitations.

Gre v. Rolfe.

Title under
mortgage.

45. (Where title is made under a mortgage in ejectment, if evidence be given that the debt is satisfied, it is considered as defeating the mortgagee's estate in the land; and in such cases, especially where the mortgage is ancient, the court will presume the money was paid at the day, and will direct the jury to find so; unless it appears clearly, that the money could not have been paid at the day. 2 *Eq. Abr.* 617.)

Defendant
set up mortgage.

46. (Defendant shall not set up a former mortgage or conveyance made by himself, for he shall not avail himself of one contract made by himself to avoid another made by him. *Gilb. E.* 160.)

2 Lord Raymond.

Recovery in
dower.

47. A defendant in ejectment is estopped by a recovery in dower from giving in evidence a term in a stranger.

1293

48. Eject-

- Lord *Raym.*
 48. Ejectment lies for small tythes, as wool or eggs. For small
Camell v. Clavering. Page 789 tythes.
- Strange.*
 49. Ejectment lies for part of a house. Part of a
Sullivan v. Seagrave. 695 house.
50. Devisee of term for years may maintain ejectment to Devisee, term
 recover the term devised, provided he has the assent of the for years.
 executor. *Young v. Holmes.* 70
51. (In the case of the devisee of a freehold, the freehold
 is immediately cast on the devisee, and he may immediately
 and without any possession maintain an ejectment; so also,
 if the heir should enter and die seized, and a discent be cast.
Co. Lit. 240. b.)
52. The question in ejectment being parcel or not par- Survey on
 cel; a survey taken by one, under whom the lessor claimed, one part.
 to which the defendants were not privy, rejected.
Anonymous. 95
53. The tenant in possession is not an admissible wit- Tenant in
 nesses for his landlord, for he is liable to an action for the possession, not
 mesne profits. witness.
Bourne v. Turner, 632
 (See *Doe v. Williams.* *Cowp.* 621.)
54. In trespass for the mesne profits, where judgment is Judgment
 had against the casual ejector, though it would have been an against ejector,
 estoppel if the present defendant had been made a defendant mesne profits.
 in the ejectment, and verdict against him; yet as he was no
 party or privity to this judgment, the defendant is admitted
 to controvert the title, and plaintiff must prove the writ of
 possession executed. *Jefferies v. Dyson.* 960
 (Vide 2 *Wils.* 115.)
55. There must be an actual entry to avoid a fine, and Entry, fine.
 the demise cannot be laid on a day before the entry.
Berrington v. Parkhurst. 1086
 (Vide *And.* 125.)
56. Where there are two demises of different lands, Two demises,
 judgment to recover his term in the singular number is suf- judgment.
 ficient. *Worrall v. Bent.* 835, 1180
57. How to lay the second demise in ejectment, it must Second de-
 be laid *aliorum tenementorum.* mise.
Fisher v. Hughes. 908
- VOL. IV D d 58. Leaving

Possession,
beer in cellar.

Strange.

58. Leaving beer in a cellar is keeping the possession, and the landlord cannot seal a lease as on a vacant possession, deliver on ejectment, and sign judgment.

Savage v. Dent.

Page 1064

Service.

59. It further appeared in this case that the attorney for the plaintiff knew whither the lessee removed and might have served him personally, which is not necessary to be done upon the premises, and in the case of renting ground to which there is no house or barn, if it is known where the tenant lives, he must be served. *It.*

(Vide 2 *Black.* 800.)

Entry by
stranger, for
lessor of
plaintiff.

60. An entry by a stranger on behalf of lessor of plaintiff, without authority, is good to take advantage of a condition, if it be assented to afterwards and before the day laid in the demise.

Fyche v. Adams.

1128

For mines,
inheritance of
manor.

61. In ejectment for mines, the lessor of the plaintiff proved himself to be lord of the manor, and that he was in possession thereof, but the same witness proving, that the defendants had had possession of the mines above twenty years; this held to be no evidence to avoid the statute of limitations, there being no entry proved to have been made on the mines within twenty years, which are distinct possession, and may be different inheritances.—Verdict for defendants.

Rich on Dem. of Lord Cullen v. Johnson.

1141

Landlord,
defendant.

1 *Wils.*

62. Where the landlord is made defendant, the plaintiff must prove the landlord's tenants in possession of the premises in question.

Smith v. Mann.

220

Prebend's
Stall.

63. Ejectment lies for Prebend's stall after collation to it.

The King v. the Bishop of London.

14

64. Where the landlord is made defendant, the plaintiff must prove his the defendant's tenant in possession of the premises in question: for the rule is—that the landlord shall defend for the premises only, wherof his tenants are in possession, and the party does not admit himself to be landlord of any premises which the plaintiff may make title to, but of such only as were in possession of those tenants.

Smith v. Mann.

220

65. Tenant

1 *Wilson.*

65. Tenant in tail mortgages for years, becomes bankrupt, and dies without suffering a common recovery, the assignee of the bankrupt brought an ejectment, and held that the tenant in tail not having suffered a recovery, could only affect the estate for his life, and the assignee shall have the estate clear under 21 J. 1. c. 19. s. 12.

Beck on demise of Hawkins v. Welsh.

Page 276

By assignee
of bankrupt,
tenant in tail.

2 *Wilson.*

66. The heir can bring an ejectment of copyhold lands, before admittance.

Roe v. Hen. 14

Copyhold.

67. In ejectment, the lessor made an actual entry in September, one thousand seven hundred and forty-four, the demise is laid in October, one thousand seven hundred and forty-four, and the defendant levied a fine in one thousand seven hundred and forty-five; the lessor had no occasion to make another entry.

Musgrave v. Kelly. 214

68. An actual entry is not necessary to be made, to avoid a fine levied without proclamations.

Entry, fine
without pro-
clamations.

Jenkins on demise of Harris v. Prichard. 45

69. Tenants in common cannot make a joint demise, for their estates are several and distinct, and there is no priority between them; one tenant in common may enfeoff another.

Tenants in
common, joint
demise.

Heatherly v. Weston. 232

70. (But joint tenants and co-parceners may join in a lease.—2 Str. 1181. 1 Lord Raymond, 726.)

71. In trespass for the mesne profits against the tenant in possession, after a recovery in ejectment by default against the casual ejector, defendant cannot pay the money into court, for the action is for a tortious occupation from the time the tenant had notice of the lessor's title.

Holdfast v. Morris. 115

72. (After judgment by default against casual ejector, plaintiff usually recovers costs of the ejectment, as well as mesne profits. *Buller N. P.* 88.)

* 71. A surrender of a lease for years, may be by writing, without a deed, or sealing, or stamp; by statute of frauds, a lease for any term of years may be created by writing, without deed, and that the same may be surrendered by deed or note in writing.—See 3. of that stat.

Surrender
without deed.

Farmer on demise of Earl v. Roger. 26

D d 2

* 72. Ejectment

Uncertainty,
description.

3 *Wilson*.

* 72. Ejectment doth not lie of a messuage or tenement, but if it be brought of a messuage and tenement, the court will give leave to strike out the words and tenement.

Goodright v. Flood. Page 23

Trespass for
mesne rates,
tenant in com-
mon.

73. One tenant in common recovers against another in ejectment by default; trespass for the mesne profit lies.

Goodtitle v. Toms. 118

(*V. Lit.* 323. *Co. L.* 199.)

74. The action for mesne profits may be brought either in the name of the nominal plaintiff in the ejectment, or by his lessor; it follows the ejectment as a necessary consequence. The judgment in ejectment by default, is of the very same effect, as if it had been after a verdict, and the court will intend every thing possible against the defendant.—Proof of the judgment in ejectment, and the writ of possession executed, sufficient. *lb.*

Demise by
heir, day of
ancestor's
death.

75. In ejectment on the demise of an heir by descent, the demise was laid on the day his ancestor died, and held to be well enough; for the fiction of law, as to the fraction of a day, shall not do wrong.

Roe on demise of Wrangham v. Hersey. 274

Right at
time of action
brought.

76. (If the heir bring an ejectment, and pending the suit his ancestor dies, yet he shall not recover, because every man must recover, according to the right he had at the time of the action brought.

T. Raymond. R. 463)

1 *Blackstone*.

That a man
has not been
heard of,
death without
issue.

77. In making title under a pedigree, evidence that a man has not been heard of for many years, is *prima facie* sufficient evidence to prove him dead without issue; he had lived at *Liverpool* about sixty years before that time, and was a labouring man;—his title, or that of his issue if living, would supersede that of the plaintiff lessor.—Five witnesses swore they believed he was dead, but knew nothing certain.—*Per Lord Mansfield*, this is sufficient evidence *prima facie* to prove him dead, without issue, and puts the opposite party on proof that he still exists.

Roe v. Hayland. 404

2 *Blackstone*.

Vill.

78. The vill in which the demised lands lie, may after verdict, be collected from the vill in which the ejection is said to have been committed.

Goodright v. Strotter. 706

79. *Quere,*

2 *Elcistore*.

79. *Quere*, whether in ejectment, one claiming title as heir, is bound to deduce any pedigree in proof of his descent; but certainly slight and loose evidence of relationship, is not sufficient.

Heir, pedigree, proof.

Roe on demise of Thorne v. Lord. Page 1099

80. (Receipts for rent, are not sufficient evidence of title in lessor, unless he prove actual payment, especially when the person who signs the receipt is living, for he ought to be examined, 1 *Atk.* 453. Where there are old rentals, and bailiffs have admitted money received by them, those rentals are evidence of payment, because no other can be had. *Id.*)

Receipts for rent

old rental.

81. Notice to quit under statute 4 *Geo.* 2. may be previous to the expiration of the lease.—Requisition to the tenant to quit, at the end of his term, implies that it must be previous.

Notice, expiration, lease.

Cutting v. Derby. 1077

82. Plaintiff producing an original lease of a term of one thousand years, and proving possession in himself, and those under whom he derived, for seventy years, the mesne assignments shall be presumed.

Mesne assignments.

Earl v. Baxter. 1228

83. Where there is a fine, and non-claim, the court will not enter into any discussion of title, till that be accounted for.

Fine, non-claim.

Driver v. Laurence. 1259

1 *Burrow.*

84. Ejectment will lie by the owner of the soil for land, which is part of the King's highway.

Part of an highway.

Goodtitle on demise of Chester v. Alker & Elmes. 143, 147

85. For the owner of the soil has a right to all above and under ground, except only the right of passage. *Id.*

Right of passage.

86. Indeed he must recover the land, subject to the easement, and the sheriff must deliver possession, subject to the easement.

Land subject to easement.

87. But yet he ought to have, and has a specific remedy, to recover the land itself. 144

Land itself.

88. Ejectment of an acre of land, described only by the name of land, though in fact there was a wall and a porch, and part of a house built, (by encroachment), upon it.

Description land, house thereon.

89. The

1 *Burrow*.Nuisance
erected.

89. The description of this as land, is sufficient, for the owner claims the land, not the nuisance erected upon it.

Page 144, 145, 146

Certainty of
Description.More latitude is allowed in ejectments, than in real actions ; sufficient certainty is enough in ejectments. *Ib.* 144Plaintiff may
recover less.

90. The plaintiff must recover according to his title, where he demands more than he has a title to ; for where more is laid, there is no reason why he should not recover less than he demanded, though the reverse will not hold.

Denn on the demise of Burges v. Purvis. 329, 330.For non-pay-
ment of rent,
ejectment by
tenant 20
years after.

91. Brought by the landlord against his tenant, under, and by virtue of 4 Geo. 2. chap. 28. § 2. and judgment had against the casual ejector by default, and possession thereupon delivered ; near twenty years after the tenant brings an ejectment against the same landlord, for the same premises ; the landlord, (who is defendant in this latter ejectment), is not obliged to produce such an affidavit as this clause requires as an essential requisite previous to his original recovery, for as it was essentially requisite, the court will presume, " that there was one regularly then made, and that " the judgment was founded upon it."

Doc on demise of Hitchings v. Lewis. 615 to 622Affidavit pre-
sumed.

Precision.

92. The same precision is not requisite in this fictitious action, as in a *præcipe* in a real action.*Cottingham v. King.* 629 to 631

Nor so much strictness as was formerly required, even in ejectments themselves.

Sufficient,
that sheriff may
know, &c.
plaintiff at his
own peril.

93. It is sufficient without so precise an exactness, that the sheriff may know without any information, what he is to deliver possession of, for the plaintiff is to shew the sheriff, and at his own peril to take possession of only what he is intitled to.

629, 630

Id.

94. (Lord *Mansfield* mentioned a case where an issue was directed to guide the sheriff in delivering execution.—*Coup.* 348)Re-entry,
disseisin, mesne
profits.

95. Where an ejectment is brought, there can be no disseisin, for the plaintiff may lay his demise when the title accrued, and recover the profits from the time of the demise, and entry confessed, is previous to the making the lease ; but there is no real or supposed re-entry after the ejectment,

ejectment, whereas if it was considered as a disseisin, no mesne profits could be recovered, without an actual re-entry.

Taylor on demise of Atkins v. Horde. Page 111

1 *Barrow.*

96. A judgment in ejectment, is a recovery of the possession, without prejudice to the right, and he who enters under it, can only be possessed according to the right *prout lex postulat.* *Ib.* 114

Judgment,
recovery of pos-
session only.

97. And he who recovers a naked possession only, without right, can convey no other to his feoffee. *Ib.*

Naked pos-
session.

98. An ejectment is a possessory remedy, and only competent where the lessor of the plaintiff may enter. 119

Possession,
remedy.

99. Therefore it is always necessary for the plaintiff to shew, " that his lessor had a right to enter, by proving a " possession within twenty years, or accounting for the want " of it, under some of the exceptions allowed by the sta- " tute of limitations, 21 Jac. 1. chap. 16." *Ib.*

Possession
within twenty
years.

100. Twenty years adverse possession, is a positive title to the defendant; it is not a bar to the action or remedy of the plaintiff only, but takes away his right of possession. *Ib.*

Twenty years
adverse posses-
sion, right of
possession.

101. Every plaintiff in ejectment must shew a right of possession as well as of property, and therefore a defendant in ejectment needs not plead the statute of limitations, as defendants in other actions must. *Ib.*

Right of
possession, right
of property.

102. Upon a special verdict in ejectment, it ought to appear, " that the lessor of the plaintiff might enter at the " time when he brought the ejectment." *Ib.* 119

Special ver-
dict, right of
entry.

103. A lease under a power made unfairly, and in pre- judice of those in remainder, found in the custody of the maker at his death, amongst his own muniments, ought at the trial to be presumed to have been surrendered, to let in the statute of limitations. *Ib.* 126

Presumed
surrender of
lease, contrary
to power,

104. The 4th Geo. 2. c. 28. §. 2. prescribes two manners of recovering in an ejectment brought by the landlord, viz. by default, and on tryal, in both which it must be made to appear, that half a year's rent was due, that there was no sufficient distress, and that the lessor had power to re-enter. In the former case of judgment against the casual ejector, (and also upon non-suit, on not confessing lease, entry, and ouster), this must be made to appear by affidavit; in the latter case, the same thing must be proved upon the tryal.

Statute 4
Geo. 2.

Doe d. of Hitchings v. Lewis. 620

105. First,

1 *Burrow.*

Mesne profits.

105. First, this is a very different case from that of the defendant in an action for the mesne profits not being estopped from going into the title by a judgment against the casual ejector; (to which judgment he was no party).

Mesne profits, six months.

106. Second, the end and intent of this act was, to limit and confine the tenant to six calendar months, after execution executed, for offering compensation, or applying for relief in equity.

Page 619, to 621

2 *Burrow.*

Real parties.

107. The lessor of the plaintiff, and the tenant in possession, are substantially and in truth the only parties to the suit.

Astin v. Parkin. 667, 668

Mesne profits in name of lessor or lessee.

108. An action for the mesne profits may be brought, either in the name of the lessor, or the lessee, it is equally the action of the lessor, or the plaintiff. *Ib.*

Title not controvertible, judgment, time of demise, length of time, value.

109. The tenant concluded by the judgment, and cannot controvert the plaintiff's title, nor possession. *Ib.*—But the judgment proves nothing beyond the time laid in the demise. *Ib.*—It proves nothing as to length of time the tenant has occupied, nor as to the value, both these must be proved in an action for the mesne profits. *Ib.*

110. If plaintiff therefore, after recovering in ejectment, proceeds for mesne profits, from the time of the ouster in ejectment, the tenant is estopped from controverting plaintiff's title; but if he proceeds for antecedent profits, he must prove his title to the premises.

111. (V. 1 D. & E. 387. 2 D. & E. 262. *Dougl.* 563. 3 *Wils.* 121. and *Buller's N. P.* 87.—If a subsequent entry has a relation back to the time of the plaintiff's title accrued, yet the plaintiff may plead the statute of limitations, and so protect himself against all but the last seven years. *Ib.* 80.)

3 *Burrow.*

History, and nature of.

112. The idea of an ejectment, the origin, improvement, utility, ease, and expedition of this ingenious fiction, adopted (in lieu of almost all real actions), for the trial of titles to the possession of land. *Fairclaim on demise of Fowler v. Shamtitle.* 1292, 1293, 1294, 1295, 1300 to 1304.

Under control of court.

113. Its great advantage is, that being under the control of the court, it may be so managed and modelled, as to answer every end of justice and convenience. *Ib.*

114. Admission

3 Burrow.

114. Admission of landlord as a co-defendant, or to defend alone. Landlord, defendant.

Fairclaim on demise of Fowler v. Sharntitle.

Page 1292, 1293, 1294, 1295, 1300 to 1304

115. A fair tryal between the claimants, is the ground and reason of both. Id. *Ib.*

116. The latter, viz. "to defend instead of the tenant in possession who abandons," is as reasonable as the former. Id. *Ib.*

117. Receipt to defendant *pro interesse suo*, was the practice before 13 E. 1. c. 3. or 11 G. 2. c. 19. Id. 1301, 1302

118. The extent of the term "landlord," as used in 11 G. 2. c. 19. Id. 1293

119. If the tenant in possession claims nothing, he ought to take no side between the claimants, who ought to have a fair trial between them, upon the real merits. Tenant in possession, claims nothing. 1293, 1300, 1304

120. On a writ of error in parliament, brought upon a judgment in ejectment, the court obliged the plaintiff in error to enter into a rule, "not to commit waste during its pendency." Writ of error. 1823

121. A discussion of the reason and practice of the common rule. Common rule. 1897, 1898

122. The meaning of it is, "to bring the matter to the mere question of the plaintiff's possessory title." Reason of it. 1897

It is sufficient to bar a non-suit, for want of proof of actual ouster. Operation of it, actual ouster. *Ib.*

123. It is sufficient in an ejectment, upon a condition broken. *Ib.*

And in all cases but to avoid a fine; in that case there must be an actual entry. To avoid fine. *Ib.*

124. In the case of a tenant in common, it is sufficient without proof of actual ouster. Tenant in common. *Ib.*

125. Trustees shall not recover possession from or dispute with their *cestui que trust*. Trustees, *cestui que trust*. 1901

126. The

3 *Burrow.*

126. The notice by tenant to quit, under stat. 11 Geo. 2. need not be in writing, a parol notice to quit is sufficient.

Timmins v. Rowleson. Page 1603

127. A parol demise from year to year, is a sufficient holding within the statute, so as to subject the tenant to the penalty of double rent, if he holds over after he has given notice to quit. *Ib.*

128. (By stat. 11 Geo. 2. c. 19. §. 12. if an ejectment is served on any lands, and the tenant does not give notice of the service of such ejectment, he shall forfeit 3 years rent of the premises, to be recovered by action of debt.)

4 *Burr.*

Assignment
by one lessor to
the other.

Deed not
produced.

129. In an ejectment under two several demises, a title was proved in one of the lessees of the plaintiff (*Mrs. Haldan*); but a witness for the plaintiff proved that she had assigned all her interest in the premises to the other by a deed then in court. The plaintiffs refused to produce this deed, upon which a nonsuit took place, for by this evidence all title was taken away from one of the lessors of the plaintiff, and there was no proof of the conveyance to the other, so no proof of any title in him.

Roe on demise of Haldane and another v. Harvey. 2484. (Vide 2 *Dur. & E.* 749—4 *D. & E.* 682—*Bull, N. P.* 110. & 2 *Wils.* 26.)

Production of
evidence against
the party.

130. *Per Lord Mansfield.*—The deliberate refusal to produce the deed, warranted the strongest presumption that the deed would shew that neither of the lessors of the plaintiff had any title. In civil cases the court will force parties to produce evidence which may prove against themselves, or leave the refusal to do it after proper notice to the jury—but in a criminal or penal case the defendant is never forced to produce any evidence, though he should hold it in his hands in court. *Ib.*

5 *Burr.*

Description:

131. Ejectments are of latter times considered with more latitude and liberality than formerly, and more general descriptions suffice. 2673. 629 to 631

Sheriff, pos-
session.

132. The sheriffs to give possession, upon the plaintiff shewing, and at the plaintiff's peril.

133. The

5 Burrow.

133. The statute of limitations never runs against a man in the case of an ejectment, but where he is actually ousted, or disseised: The possession of one joint-tenant is the possession of the other, so as to prevent the statute of limitations.

Ejectment,
actual ouster.

Fairclaim v. Shackleton. Page 2604

134. A receiver appointed by chancery is an agent properly qualified within the words of the statute, and if he gives notice to the tenant to quit, and the tenant holds over, he shall forfeit the double value.

Notice by
agent, receiver.

Wilkinson v. Colley. 2694

The statute says "after demand and notice in writing;" notice is itself a demand.

Ib.

It is said that in the case of an infant lessor, the declaration ought to set forth a lease by deed rendering some rent, else the lease would be not merely voidable, but absolutely void, and, tho' fictitious, it ought to be good, at least by possibility. 2 Leon. Case 275. fo. 218. 6 Mod. 248.

Cooper.

135. A man shall not defend himself in it by an estate which makes part of the title of the lessor of the plaintiff, as by setting up the estate in trustees against the heir at law.

Defence,
part of lessor's
title.

Hart v. Knott. 46

136. If the lessor of the plaintiff be an infant, and the guardian undertake for costs, it is sufficient.

Lessor of
plaintiff, an
infant.

Anonymous. 128

137. The lessor of the plaintiff in ejectment shall not be permitted to defeat a *solum* deed under his own hand, covenanting that the defendant shall enjoy the premises, and for further assurance no more than a mortgagor shall be permitted to dispute the title of his mortgagee.

Deed from
lessor of plaintiff
to defendant.

Goodtitle v. Bailey. 597

138. Though the testator held under an old term of two thousand years, that will not avoid the title, if the jury are satisfied that he has been in possession twenty years, is evidence of a fee. No man has a lease of two thousand years as a lease, but as a term to attend the inheritance.

Term to at-
tend inheritance.

Ib. 597

139. The

Cowp.

Notice, acceptance of rent after.

139. The mere acceptance of rent, after a notice to quit which had accrued after the time of the demise, is not a waiver of the notice; it must appear *quo animo* the rent was received. If both parties intended the tenancy should continue, there is an end of the plaintiff's title; if not, the plaintiff is not barred of his remedy by ejectment. The lessor of the plaintiff may bring an action for use and occupation of the same premises, for rent which had accrued subsequent to the time of the demise.

Cheney v. Batten. Page 246

Fine, conusor, possession.

140. In proving a fine, you must shew that the conusor was in possession, and received rent.

Doe v. Williams. 632

Agreement unstamped, to grant lease to defendant.

141. A. by agreement in writing unstamped, articles with B. to grant him a lease for 21 years, B. has possession 18 years without any lease being demanded or tendered; this agreement is a good defence to an ejectment brought by A.

Weakly ex dim. Tea v. Bucknell. 473

Possession under judgment in ejectment, not disseisin.

142. Possession under a judgment in ejectment can never amount to a disseisin of the freehold.

Doe v. Horde. 701

Enures according to the right.

143. But such possession enures according to the right of the party recovering, whether it be a right of freehold in possession, in tail or in fee. *Id.*

Secret feoffment, tenant to *precipe*.

144. A secret feoffment under a naked possession by tenant in tail in remainder, to the mere intent to make a tenant to the *precipe*, cannot work a disseisin to the advantage of the feoffor. *Id.* 702

But the true owner may elect to make it a disseisin. *Id.*

145. The defendant's title in ejectment was a thirty six years peaceable and sole possession of the lands which he originally held as tenant in common with one *Mary Taylor*, without any account to, or demand or claim by her under whom the lessors of the plaintiff claimed, held a sufficient ground for a jury to presume an actual *ouster* of the co-tenant and adverse possession.

Doe en Dem. Fijbar & Taylor v. Proffer. 217

146. (In

Howp.

146. (In ejectments by tenants in common, entry by one shall be good for all. *Smoles v. Dale. Hob. 120.*—In general where two persons claim by the same title, there shall be no adverse possession, so as to toll an entry of the one, but the entry of the other be at all times lawful. *Co. Lit. 242. and Lit. 296, 297.*)

147. (Tenant for the crown for ninety-nine years, is out of possession for more than twenty years, yet he may recover in ejectment. *Runnington on Ejectment, 15. Cro. El. 31.* But now by 9 *Geo. 3. c. 16.* 60 years will bar the king.)

Tenant of the crown, ninety-nine years possession.

148. (If A. be outlawed, and his lands are extended upon an inquisition, such outlawry and inquisition do not take away the entry of a third person who claims title to the lands extended, but leave him his remedy by ejectment or recovery thereof, for the king acquires no title or interest in the land, but only to the profits by the outlawry; and the possession being still in A. it were absurd to suffer his outlawry to privilege it against the entry of a third person, who might have been disseised of the lands. *Harbrefs, 176.*)

Outlawry, inquisition, extent.

149. When the possession of a tenant is adverse, it is not necessary to give him notice to quit, in order to support an ejectment against him.

Notice, adverse possession.

Doe v. Williams. 622

Douglas.

150. A notice to quit, "or I shall insist on double rent," is good to support an ejectment; it refers to the statute, and points out the legal consequences, which is double the yearly value for an over holding tenant, by 11 *Geo. 2. c. 19. s. 18.* Where the tenant gives notice that he means to quit, and does not, it is double rent.

Notice, double rent.

Doe v. Jackson. 167, 168.

151. A mortgagee may recover possession without notice to quit, against the mortgagor, or a tenant who claims under a lease from the mortgagor, posterior to the mortgage, and without the privity of the mortgagee.

Mortgagee, against tenant of.

Keech v. Hall. 21 to 23

152. *Per Lord Mansfield.*—For by the mortgage, the mortgagor, when left in possession, becomes strictly a mere tenant at will; no notice is ever given to him to quit, he is not even entitled to the crop, as other tenants at will are, because all is liable to the debt, on payment of which all the

the

the mortgagee's title ceases. The mortgagor has no power, either express or implied, of making leases not subject to every circumstance of the mortgage. If the mortgagee had encouraged the tenant to lay out money, he could not maintain this action before the end of the term granted by the mortgagor.

Keech v. Hall. Page 21 to 23

Douglas.

153. *Per Lord Mansfield.*—The act of 4 Geo. 2. is very perplexed, but the meaning certainly only is that where there is no stipulation in the lease for entry without demand, you may notwithstanding enter without demand, provided six months rent is in arrear, and there is not a sufficient distress, otherwise in such cases you must make a demand.

Goodright v. Cator. 462

Mere trustee.

154. Where it is clear that the person in whom the legal estate is vested is a mere trustee, he shall not avail himself of his title to defeat his *cestui que trust* from recovering in ejectment.

Doe v. Patt. 695

Id.

155. But this rule is subject to qualification of its being clearly the case only of a mere trust, for then by taking notice of it the court prevents delay and expence.

Goodright v. Wells. 741

156. But the court will not decide when there is a doubt, but leave the question to a jurisdiction, which regularly takes cognizance of matters of trust; where it is doubtful the legal right ought to prevail.

Id. 747

1 *Durnford and East.*

Description.

157. Ejectment for a messuage and tenement is good after verdict.

Doe. dem. Stewart v. Denton. 11

Id.

158. So is ejectment for a messuage or tenement. *Id.*

Chambers in
New Inn.

159. A surrender of chambers in New Inn, to the treasurer and antients of the society, made with their assent, to the intent that they may grant the chambers to a purchaser, passes the estate to such purchaser before admission, and therefore, upon the death of the surrenderee, before admission, the society may maintain ejectment for them.

Doe dem. Warry and others v. Miller and another. 393

160. Where

1 Durnford and East.

160. Where a term is to end on a precise day, there is no occasion for a notice to quit, because both parties are apprised that unless they come to a fresh agreement, there is an end of the lease. Expiration of term, notice.

Messenger v. Armstrong. Page 52

161. A tenant to a mortgagor, who does not give him notice of an ejectment brought by the mortgagee to enforce an attornment, is not liable to the penalties of the 11 Geo. 2. c. 19. s. 12. for secreting ejectments. Tenant of mortgagor, notice.

Buckley v. Buckley. 647

The statute only extends to cases which are inconsistent with the landlord's title. *Ib.*

162. The trustee of a term not having notice of an agreement for a lease before the grant of the term, may maintain an ejectment against the tenant in possession, under the agreement. Trustee of term.

Goodtitle dem. Eastwick v. Way. 735

163. A paper containing words of present contract, with an agreement that the lessee should take possession immediately, and that lease should be executed *in futuro*, operates only as an agreement for a lease, and not as a lease itself, and therefore it need not be stamped, if executed before 23 Geo. 3. c. 58. Agreement for lease.

Ib. 735

164. Plaintiff in this case claimed under a demise from A. dated one thousand seven hundred and eighty four, in trust for creditors; defendant claimed under an agreement from A. dated one thousand seven hundred and seventy nine, for a lease, and that defendant should have immediate possession; objected that plaintiff claims as a volunteer, and is a trustee for defendant, and cannot eject his *cestui que trust*. *Per Curiam*. This principle holds only in clear cases of trust, when chancery would of course decree a conveyance; but this is a trust for creditors and not merely voluntary, and the defence being a doubtful equity, is not sufficient. Trustee, cestui que trust.

Ib.

165. One tenant in common cannot set an outstanding unsatisfied term in bar to an ejectment, for a moiety by another tenant in common. Tenant in common, outstanding term.

Doe dem. Briflowe v. Pegge. 759 n.

166. An ejectment was brought for a moiety of the manor of *Winkburn*, under the will of *Doctor Barnell*, as one of his coheirs, by the testator's marriage settlement, A. D. one thousand seven hundred and forty eight; two terms had been created, one for ninety-nine years, to secure an annuity of two hundred pounds *per annum* to the testator's mother; the other of one thousand years, to raise two thousand

thousand pounds for his wife, in case she had no issue; the testator died in one thousand seven hundred and seventy four, leaving no issue, and by his will devised all his estates to trustees, in trust after the death of his wife, for such persons as, according to the laws of descent, should be his heirs at law; the defendant, in one thousand seven hundred and seventy six, had been found heir at law, in consequence of an issue out of chancery, as descended from a daughter of a common ancestor, and was in possession; the lessor of the plaintiff claimed as heir at law, by descent from another sister of the same ancestor, and brought for a moiety, and did not mean to disturb the terms above created; the defendant set up these terms against him, but it was adjudged that as the plaintiff went to recover the lands, subject to the uses of the subsisting term, that this term should never be set up by a third person.

Doct dem. Brislowe v. Pegge. Page 759

I Durnford and East.

Trust term,
real owner.

167. Where a trust term is a mere matter of form, and the deeds mere muniments of another estate, it shall not be set up against the real owner. *Ib.*

168. If it were necessary to take assignments of satisfied terms, terrible inconveniencies would ensue from the representatives of the trustees not being to be found. *Ib.*

Trust, *cestui que*
trust.

169. A trust shall never be set up in an ejectment against him for whom the trust was intended. *Ib.*

170. An outstanding unsatisfied term is not therefore always an answer to a plaintiff in ejectment. *Ib.*

Tenant in
possession, set up
lease in bar.

171. A tenant in possession under a lease, whose tenancy is not meant to be disturbed by the lessor of the plaintiff in ejectment, shall never set up his lease to bar the recovery. *Ib.*

Mortgagor,
title of third
person.

172. A mortgagor cannot set up the title of a third person against his mortgagee in an ejectment. *Ib.*

Tenant, title
of third person.

173. Nor can a tenant who has paid rent, and acted as such, set up the title of a third person in an ejectment, to bar his own lessor, as that of the mortgagee against the mortgagor, notwithstanding the old rule, that the plaintiff is to recover by the strength of his own title. *Ib.*

Second
mortgagee re-
cover against
first.

174. A second mortgagee who takes an assignment of a term to attend the inheritance, and has all the title deeds, may recover in ejectment against the first mortgagee, not having notice of such prior mortgage, because if a mortgagee lends money on a mortgage, without taking the title deeds, he enables the mortgagor to commit a fraud.

Goodtitle dem. Norris v. Morgan.

x Durnford and East.

175. If a subsequent purchaser or mortgagee has notice of a former purchase or incumbrance, he shall not avail himself of an assignment of an old outstanding term prior to both, in order to get a preference.

Subsequent mortgagee; notice.

Willoughby v. Willoughby. Page 763

176. But if he had no notice of such prior incumbrance or purchase, and has the first and best right to call for the legal estate, then if he gets an assignment of it; a court of equity will not deprive him of his advantage.

No notice of prior incumbrance.

Ib.

177. If a second mortgagee lend his money upon an estate, upon which there is an old outstanding term, and has notice at the same time of a certain incumbrance prior to his own; the prior incumbrancer has the best right to call for the legal estate; and to satisfy himself of any other incumbrances upon the estate, although such other incumbrances were not known to the second mortgagee at the time he had advanced his money.

Outstanding term, second mortgagee.

Ib.

178. If a landlord gives notice to his tenant to quit at the expiration of the lease; and the tenant hold over, the landlord is entitled to double rent; and a second notice to quit on a subsequent day, or to pay double rent; is no waiver of such first notice, or of the double rent which has accrued under it; it only expresses that which in the former was to be collected by intendment.

Second notice to quit; waiver.

Messenger v. Armstrong. 52

179. Where the term of a lease is to end on a precise day, there is no occasion for a notice to quit, because both parties are apprized that the lease is of course at an end, unless they come to a fresh agreement.

Terms to end on precise day, no notice.

Ib. 53, & 162

180. In the case of a tenancy from year to year, there must be half a year's notice to quit; ending at the expiration of the year.

From year to year, six months notice, ending, &c.

Right dem. Flower v. Darby and another. 159

181. Six months notice is not sufficient. *Ib.* 163 *Id.*

182. There is no distinction between houses and lands, as to the time of giving notice to quit.

No distinction on, houses or lands.

Ib. 162, 3

183. Where one in remainder after the expiration of an estate for life, gave notice to the tenant to quit on a certain day, and afterwards accepted half a year's rent, such ac-

Acceptance of rent, after notice.

ceptance being only evidence of a holding from year to year is rebutted by the previous notice to quit, and therefore the notice remains good.

Sykes dem. Murgatroyd & Wilkes v. ———, coram Blackstone, J. York Summer Assizes 1774. ———
Cited in *Right v. Darby*. Page 161

I Durnford and East.

Proof of different commencement of term.

184. In an ejectment brought by Mr. *Duncombe*, he could not prove the time when the term commenced, and the tenant proving it to be different from the time to quit mentioned in the notice, the plaintiff was nonsuited.

Coram Lord Mansfield, at G. H. 161

Notice.

185. In ejectment, *Eyre*, Baron, held a notice to quit at *Lady-day*, to be *prima facie* evidence of a holding from *Lady-day* to *Lady-day*, till the contrary was shewn.

Doe dem. Puddicombe v. Harris. Sum. Ass. 1774, at Dorchester. 161

Cellar, part and parcel.

186. A demise of premises in *Swallow-street, Westminster*, late in the occupation of *A.* particularly describing them, part of which was a yard, does not pass a cellar situate under that yard, which was then in the occupation of *B.* another tenant of the lessor: and the lessor in an ejectment brought to recover the cellar, is not estopped by his deed from going into evidence to shew that the cellar was not intended to be demised.

Doe dem. Freeland v. Burt. 701

Leasing power, usual covenants.

187. Under a power to a tenant for life to lease for years, reserving the usual covenants, &c. a lease made by him containing a proviso, that in case the premises were blown down or burned the lessor should rebuild, otherwise the rent should cease, is void, the jury finding that such a covenant is unusual.

Doe dem. Ellis v. Sandham. 705

Agreement for lease.

188. A paper containing words of present contract, with an agreement that the lessee should take possession immediately, and that a lease should be executed in future, operates only as an agreement for a lease, and not as a lease itself; and therefore it need not be stamped if executed before the 33 Geo. 3. c. 58.

Goodtitle dem. Estwick v. Way. 735

Stamp.

189. A lease in writing though not under seal, cannot be given in evidence unless it be stamped. *Ib.*

190. Tenant

1 *Durnford and East.*

190. Tenant from year to year before a mortgage or grant of the reversion, is intitled to six months notice to quit before the end of the year, from the mortgagee or mortgagee's grantee. Six months notice from mortgagee.

Birch v. Wright. Page 380

191. The defendant in this case was tenant from year to year to Mr. *Bowes*, and he and his wife granted an annuity to the plaintiff, charged on the estate of which the defendant was tenant in the year 1777; *Bowes* received the rents till November 1784, when 81*l.* rent was in defendant's hands. In 1785, the plaintiff brought an ejectment and recovered possession, and then gave notice to the tenant (the defendant) to attorn to him and pay over to him the rent then in his hands. Defendant refused to attorn or pay him the rent; upon which a writ of possession was executed and this action brought for use and occupation, for the rent accruing from the time when the last payment was made to *Bowes*, to the execution of the writ of possession. It was resolved that the plaintiff might recover for the time before the ejectment brought, but not for the rent accrued after; for by bringing the ejectment the plaintiff had from that time considered the defendant as a trespasser, and his title tortious, and so there could be no contract implied. 1*b.*

2 *Durnford and East.*

192. Declarations of tenants are admissible evidence after their death, to shew that a certain piece of land is parcel of the estate, which they occupied; and proof that they exercised acts of ownership in it, not resisted by contrary evidence, is decisive. Declaration by tenants.

Davies v. Pierce. 53

193. Where the plaintiff claimed as devisee in remainder, under a will twenty-seven years ago, under which there was no possession, declarations by the tenant who was in possession at that time, that he held as tenant to the deviser, are admissible evidence to prove seisin in the deviser.

Holloway v. Rakes. (cited) 55

194. Where an infant becomes entitled to the reversion of an estate leased from year to year, he cannot eject the tenant without giving the same notice as the original lessor must have given. Infant intitled to reversion, six months notice.

Maddon dem. Baker v. White. 159

Estopped,
trustees.

2 *Durnford and East.*

195. The trustees of a public turnpike act, which empowers them to erect toll-houses and mortgage the tolls, and which declares that there shall be no privity among the creditors, have no power to mortgage the toll-houses or gates. If in fact they have made such a mortgage, and an ejectment is brought against them by the mortgagee, they are not estopped by their deed from insisting that the act gives them no such power, they not acting for their own benefit but for the publick, besides the court will take notice of the publick act of parliament.

Fairtitle on dem. of Mytton v. Gilbert. Page 169

Legal, not
equitable title.

196. If there be an agreement before marriage that a settlement shall be made of the wife's estate, reserving to her a power of disposing of it, which agreement is signed by the intended husband and wife, but not sealed, and before the marriage the wife disposes of it to the husband, who survives her and demises the estate by will; the title of his devisee is such a doubtful equity as cannot be set up in an ejectment against the title of the wife's heir at law.

Doe dem. Hodsdon v. Staple. 684

Presumed
surrender,
term.

197. In ejectment the plaintiff must recover on a legal title. A satisfied term may be presumed to be surrendered, but an unsatisfied term raised for the purpose of securing an annuity during the life of the annuitant cannot, and may be set up as a bar to the heir at law, even though he claim only subject to the charge. *Ib.*

Id.

198. *Per Grose, J.*—The owner of the estate raised a term for ninety-nine years, and said that for particular purposes the trustees should have the possession of the estate;—then if the trustees are in possession, no person can turn them out of possession till the purposes of the trust are answered. *Ib.*

(*Buller, J.* differed from the Court. *Vide* 1 *D. & E.* 758.)

Election of
infant to hold
premises, no-
tice.

199. There was an agreement for a lease made by the lessor of the plaintiff for her own life, but a clause in it that her son (who was then an infant) should have a power to take the house himself when he came of age; it was adjudged that under this agreement the son should make his election in a reasonable time after he came of age, and that where he did not do so for a year, and then gave half a year's notice to the tenant to quit, that the tenant could not on such notice be evicted.

Doe on demise of Bromfield v. Smith. 436
200. Lessor

2 *Durnford and East.*

200. Lessor of the plaintiff claimed under a demise of the rectory house, &c. from the rector for twenty-one years, and the defendant had entered on him without any colour of title whatever; the defendant at the trial relied on the lease being void under statute 13th *Elix.* c. 20. by reason of the non-residence of the rector, he having been absent for more than eighty days within the year.—*Per Curiam.* By the statute, the lease is void for non-residence, and therefore though the defendant was a stranger and a wrong-doer, the plaintiff cannot recover.

Doe on demise of Crisp v. Barber. Page 749
(V. 4 D. & E. 682. 4 Burr. 2484.)

201. (Ejectment for rectory, plaintiff must prove that his lessor was admitted, instituted and inducted, that he read the thirty-nine articles, and assented to the book of common prayer, but he need not prove a title in his patron; for the rightful patron may bring *quare impedit.* *Snow v. Phillips.* 1 Sid. 220. He must also prove presentation. 1 Vent. 1414.) Parson, rector.

3 *Durnford and East.*

202. In the case of a tenancy from year to year, as long as both parties please, if the tenant die intestate, his administrator may declare in an ejectment, on a term for seven years; for the time is not conclusive. Interest of intestate, administrator.

Doe dem. Shore v. Porter. H. 29 Geo. 3. 13

203. Whatever chattle interest the intestate had (which was a lease from year to year) vested in the representative. *Ib.*

204. (If the spiritual court grant administration *pendente lite*, such an administrator may maintain an ejectment. *Per Lord Hardwicke.* 2 Atk. 286.)

205. The court will not permit a devisee, not having been in possession, to be made defendant in ejectment instead of the tenant, as landlord, under the 11 Geo. 2. c. 19. s. 13. but they will permit the heirs at law, or remainder man claiming under the same title.

Lovelock v. Dancafter. 783

4 *Durnford and East.*

206. The court will permit a devisee in trust, not having been in possession, to defend in ejectment as landlord, under 11 Geo. 2. c. 19. s. 13. but not the *cestui que trust.* Devisee, defendant as.

Lovelock on dem. of Norris v. Dancafter.
Mitch. 31 Geo. 3. 122

207. A

4 *Durnford and East.*

Parol demise,
four years, te-
nancy at will.

207. A parol agreement to lease lands for four years, only creates a tenancy at will, by statute of frauds; and if that tenancy be not determined before the day of the demise laid in the declaration, the plaintiff cannot recover. *Goodtitle dem. Gallaway v. Herbert. B. 32 Geo. 3. Page 680*

208. In this case it was agreed between the lessor of the plaintiff and the defendant, that the defendant should hold a farm from *Michaelmas* 1791, for four, eight, or twelve years, &c. there was no memorandum in writing, or lease; the demise was laid on the first of *October*, possession was demanded on the fifth of the same month, and refused,

209. *Per Lord Kenyon.*—The statute of frauds says, that such an agreement as the present, shall only have the effect of creating a tenancy at will; now a tenant at will is not a trespasser: here the tenancy was not determined until after the day of the demise in the declaration, and consequently the plaintiff cannot recover. *Ib.*

Landlord's
title expired,
defence.

210. In ejectment by a landlord against a tenant, whose lease is expired, the latter is not barred from shewing that his landlord's title is expired.

England dem. Syburn v. Slade. E. 32 Geo. 3. 682
(*Vide 4 Burr. 2484. Roe v. Harvey, & Doe v. Barber, 2 D. & E. 749.*)

Trust, con-
veyance pre-
sumed.

211. In the case of a plain trust, where the trustees were directed to convey to a devisee, on his attaining twenty-one, the jury may be directed to presume a conveyance at any time afterwards, though considerably less than twenty years; for it was what they were bound to do, and what a court of equity would have compelled them to have done, if they had refused, and it is rather to be presumed that they did do their duty. *Per Lord Kenyon. Ib.*

(See *Buller, N. P. 110.*)

212. This was an ejectment for an inn, at *Lewisham*, in *Kent*. The defendant having proved the expiration of the lease, under which the lessor of the plaintiff claimed, under one *George Pym*, another lease was offered in evidence, made to the lessor of the plaintiff by one *John Pym*, who claimed under the will of *George Pym*, who thereby devised the estate in question to trustees *in trust for John Pym, and to convey the same to him when he attained the age of twenty-one years*: this age he had attained three years before, but there was no conveyance from the trustees to *John Pym* given in evidence;

evidence ; for this, justice *Gould* non-suited the plaintiff, the legal estate being in the trustees. On a motion for a new trial the court set the non-suit aside, holding *that a conveyance might be presumed, &c.*

4 Durnford and East.

213. The defendant in ejectment is entitled to the general reply, where the plaintiff claiming by descent, proves his pedigree; and stops; and the defendant sets up a new case, in his defence, which is answered by evidence on the part of the plaintiff.

Goodtitle v. Brabam. Page

214. The lessor of the plaintiff was an infant when the fine was levied, which was in *Trinity* term, one thousand seven hundred and seventy-five, but came of age in *February*, one thousand seven hundred and eighty-four, and in *December*, one thousand seven hundred and eighty-four, was imprisoned for debt, and so continued till one thousand seven hundred and eighty-nine, when the ejectment was brought: it was resolved, that not having made an entry when he came of full age, that the statute ran against his claim, though so soon after another disability incurred.

Fine, entry after infant came of age, five years.

Doe on dem. of Duroure v. Jones. 300

215. (For when once the five years allowed to an infant to make an entry, for the purpose of avoiding a fine, begin, the time continues to run, notwithstanding any subsequent disability. *Ib.*)

(See *Stowell v. Lord Zouch. Plowd. 355.*)

216. Where the mother is a natural born subject, and the father an alien, in such case a child born abroad, cannot take lands by inheritance, even though the lands came by descent from the mother. *Ib.*

217. It was held that where the service of the notice to quit, was on a maid servant in the defendant's house (which was not situated on the demised premises), to whom it was delivered, and the contents of it explained, but there was no evidence of its having come to the defendant's hands; the court held this a good and sufficient service; for the servant who was in the power of the defendant, might have been called to prove that she had not communicated the notice to her master; there was therefore, presumptive evidence that he had received it.

Service on servant, not on premises.

Jones v. Marsh. 464

218. The

Defective notice to quit, advantage taken at trial.

4 *Durnford and East.*

218. The defendant held from *Michaelmas*, and the notice to quit was at midsummer; on receiving the notice he made no objection as to the time, but said, "I pay rent enough already, and it is hard to use me thus." The court held that the objection to the insufficiency of the notice was not waived, but that the defendant might avail himself of it at the trial.

Oakapple v. Copens. Page 361

Agreement between remainder man and lessee.

1 *H. Blackstone.*

219. Tenant for life makes a lease for years to commence on a certain day, and dies (before the expiration of the lease) in the middle of a year; the remainder man receives rent from the lessee (who continues in possession, but not under a fresh lease) for two years together, on the days of payment mentioned in the lease: this is evidence from which an agreement will be presumed between the remainder man and lessee, that the lessee should continue to hold from the day, and according to the terms of the original demise; so that notice to quit ending on that day, is proper.

Roe on dem. Jordan v. Ward. 97

Notice, distress after.

220. A distress taken for rent, after the expiration of a notice to quit, is a waiver of the notice.

Zouch v. Willingale. 311

Ver. and Scr.

Judgment by default, arrear ascertained.

221. In ejectment for non-payment of rent, judgment by default and execution, the arrear having been ascertained by affidavit before a commissioner, are good, and deprive the tenant of a right of entry.

Kenmare v. Lessee of Supple. 1

Tender of costs within six months, actual payment.

222. Tender of the costs and arrear within six months, does not give the tenant a right to enter; he must within six months either actually pay the arrears and full costs, or deposit them in a court of equity on filing a bill: otherwise he is for ever barred and foreclosed. 16.

Annuitant.

223. An annuitant cannot take defence to an ejectment, for the lands whereon the annuity is charged; but a trustee who has the legal estate, may.

Balfour v. Cas. Ejector. 98

Judgment by consent, writ, enquiry.

224. Upon judgment by consent, the plaintiff may release his damages, and have judgment without a writ of enquiry, and execution for his costs *de incrementis*.

Lessee of D'Este v. Hart. 229

225. A

Per. and Scr.

225. A person having lain by for a year after an *habere* Latches of
was executed, without any reason for his latches, shall not one year.
be let in to take defence.

Lessee of Stannard v. Cas. Ejector. Page 236

226. Notice of trial mentioning the name of the casual Name of ca-
ejector instead of the real defendant's, is bad ; and non suit sual ejector.
for the defendant's not appearing to confess lease, entry, and
ouster, therefore set aside.

Sharp v. Corrigan. 236

227. Six months having elapsed since execution in eject- Six months
ment for non-payment of rent, a mortgagee of the tenant's after execution,
interest is put into possession, before the expiration of nine mortgages, nine
months after the execution, upon payment of the arrear and months.
costs to the landlord.

Lessee of Bernard v. Brownrigg. 259

228. Tenant at will is not entitled to any notice to quit. Tenant at
Lessee of Domville v. Fowson. 292 will, no notice.

Espinasse, Cases at N. P.

229. Ejectment for an house.—Defendant had taken the Notice, one
house by the month, and a month's notice to quit had been month,
given ; it was agreed that the notice had a reference in all
cases to the letting, and that a month's notice was sufficient
to entitle plaintiff to recover.

Dec on demise of Parry v. Hazell. 95

(*Sittings after Hilary term, King's-Bench, 34 Geo. 3.*)

Escape.

Escape.

Salkeld.

1. **A** Precedent assent of the plaintiff will excuse an escape, but not a subsequent.

Scott v. Peacock. Page 271

2. If one taken on an erroneous *ca. sa.* escapes, yet the sheriff is liable ;—*aliter*, if on a *cap. ad respond.*

Shirley v. Wright. 273

3. If one be committed to the sheriff for a crime, and the gaoler suffer him to escape, the gaoler is liable and not the sheriff. *Id.*

4. For the sheriff shall answer civilly for the faults of his gaoler, but not criminally. *Id.*

Strange.

5. Superseded because the party was entitled to a discharge. 401

6. An escape is purged by a return, and the escape warrant cannot be executed afterwards. 423

7. Attachment not to be granted for a voluntary escape. 532

8. Recaption must be before action brought.

Stonehouse v. Mullins. 873

9. Action lies for the escape of an outlaw.

Cooke v. Champneys. 901

10. It must appear that the commitment was of record.

Wightman v. Mullens. 1226

11. Husband and wife may join in an action of escape of one in execution at their suit, on process of a court of equity.

Huggins v. Durham. 726

Hardwicke.

12. In an action of debt for an escape, on *nil debet* pleaded, the plaintiff must prove his whole case.

Wilkinson v. Salter. Page 295

13. In a negligent escape, recaption is a good plea for the sheriff, but not in the case of a voluntary one. S. C.
295, 296

14. If a sheriff or gaoler makes a prisoner his turnkey, it is a voluntary escape. 297

15. *Quere*, if the statute of the 8th and 9th W. 3. c. 27: is in force in Ireland. 16.

3 *Blackstone.*

16. Debt lies against the sheriff for an escape to recover the whole debt and damages, if a defendant taken in execution is seen afterwards at large for any the shortest time, even before the return of the writ.

Hawkins v. Plowry. H. 16 Geo. 3. 1048

2 *Durnford and East.*

17. A voluntary return of a prisoner after an escape before action brought, is equal to a retaking on a fresh pursuit; but it must be pleaded.

Bonafous v. Walker. 126

18. Under a count for a voluntary escape, the plaintiff may give evidence of a negligent escape, and the defendant may plead a retaking on a fresh pursuit to such a count, without traversing the voluntary escape. 16.

(See 3 D. & E. 172.)

Estoppel.

Salkeld.

1. **W**HERE an estoppel works on the interest of the land, it runs with it, and is a title.

Treviban v. Lawrence. Page 276

2. A jury is bound by estoppel, unless the party leaves the fact at large by pleading. *Ib.*

3. Where the estoppel appears on record, the other side may demur. *Ib.* 277

4. A *scire facias* against ter-tenants, reciting a judgment of a wrong term, and on *nul tiel record*, judgment for the plaintiff, and *elegit* thereon. In ejectment, the defendant is estopped to take advantage of variance. *Ib.* 276

5. A judgment against an executor by confession or default, is an admission of assets, and he is estopped to say the contrary on a *devastavit* returned, and so is a jury.

Rock v. Leighton. 310

1 Lord *Raymond*.

6. Where an heir in tail is returned heir in fee, and warned after the award of execution, he cannot give the intail in evidence on an ejectment.

Rock v. Layton. 590

7. A lease before purchase may enure by estoppel, but not if it appears by recitals, that at the time of the demise the lessor had nothing in the land.

Hermitage v. Tomkins. 729

8. A lease for years may operate as to part by estoppel, and as to the residue, by passing an interest.

Gilman v. Hoare. *Salkeld* 275

2 Lord *Raymond*.

9. In what case estoppels must be pleaded.

Treviban v. Lawrence. 1051, 1054

2 Lord *Raymond*.

10. In debt for rent, where the plaintiff declares upon a demise by indenture, the defendant cannot plead *nil habuit in tenementis*, and it is ill upon demurrer without replying the estoppel, because that appears upon record.

Palmer v. Ekins. Page 1551, 1554

11. A defendant who has pleaded a misnomer in abatement, is estopped by his plea to deny that name in another action or indictment.

The Queen v. Stedman. 1308

12. By a recognizance to a corporation, the defendant is estopped to say they are no corporation.

Henriques v. Dutch West India Company. 1535

13. An assignee of the reversion shall have the benefit of the estoppel against a lessee by indenture.

Palmer v. Ekins. 1551

14. A lessee by indenture cannot plead *nil habuit*, &c. specially, without admitting an interest. *Ib.*

15. In a *scire facias* upon a misrecited judgment, the defendant pleads *nil tunc record*, and it is found that there is such a record, he is estopped from shewing the variance after.

Treviban v. Lawrence. 1050

16. An estoppel that creates an interest in, or works upon the estate of the land, estops a jury. *Ib.* 1051

17. The heir in tail suffers judgment in a *scire facias* by default—he is estopped to claim the benefit of the entail. *Ib.*

Strange.

18. A man covenants to pay the rent reserved by a former indenture—he is estopped to say no rent was reserved.

Atkinson v. Coatsworth. 512

19. The tenant is not estopped by description of lands in the lease.

Skipwith v. Green. 610

20. Where

Strange.

20. Where estoppel appears on the record, it need not be replied.

Palmer v. Ekins. Page 818

21. An assignee may take advantage of an estoppel.

Ib.

3 *Duraford and East.*

22. *A.* asserting that he had a right to a patent machine, covenanted with *B.* that he should use it in a particular manner, in consideration of which *B.* covenanted that he would not use any other. In an action by *A.* on the covenant, *B.* is not estopped by his covenant from pleading in bar to the action, that the invention was not new, or that the patentee was not the inventor—but he may thus shew that the patent was void, and consequently that there was no consideration to him.

Hayne v. Malby. M. 30 Geo. 3. 438

23. But in an action by the assignee of patentee against the patentee himself, he is estopped from shewing that it was not a new invention against his own deed.

Oldham v. Langmead. Sitt. after Trinity 1789, coram Lord Kenyon, (cited.) *Ib.* 439 & 441

Evidence.

Evidence.

Holt.

1. **W**HERE one of the witnesses denied the attestation to a deed, to be his hand-writing, Lord *Holt* ordered him and another person of the same name, to write their names. Witness denies attestation.

Osborne v. Hosier. Page 194

2. A demurrer to evidence admits the truth of the fact, but denies its effects in law. Demurrer to.

Anonymous. 219

3. A recovery against a stranger of a duty prescribed for, good evidence, unless covin or collusion in the first action. Recovery of duty against stranger.

The City of London v. Clerke. 284

4. On issue on *non assumpsit infra sex annos*, &c. you need not shew the original where the date is shewn upon record. Limitation, original.

Edwards v. Thompson. 284

5. A sentence in the spiritual court, whilst unrepealed, is collusive against all matters precedent, of spiritual cognizance, and good evidence in the temporal courts. Sentence in spiritual court.

Junas v. Box. 285

6. A copy of a copy is not evidence, but the act of the court at *Doctors Commons* is an original, and not a copy. Copy of copy.

Reeve v. Long. 286, 289

7. Evidence admitted to bastardize a man after his death. To bastardize after death.

Pride v. Earl of Bath. 287

8. The copy of a conviction before the commissioners of excise, is good evidence. Commissioners of excise.

Fullers v. Fatch. 288

9. Upon conviction before commissioners of excise, the party is not at liberty on an action brought, to falsify the fact on which they grounded their judgment, if within their power. Id.

Ib. 288

10. In all cases where the original is evidence, the copy is evidence, as the book of a town-clerk; but if the original be Where original is evidence, copy is.

be but a copy; there a copy of such original may not be read.

The King v. Haines. Page 289, 293

Holt.

Sworn copy,
original, public
nature.

11. Wherever an original is of a public nature, and would be evidence if produced, an immediate sworn copy thereof will be evidence; as the copy of a bargain and sale, or of a deed enrolled: but where an original is of a private nature, a copy is not evidence; unless the original is lost or burned.

Lynch v. Clarke. 293

Book of town-
clerk.

12. A town-clerk's book, in which many persons made entries, rejected as evidence.

The King v. Haines. 289

13. An history may be evidence of the general history of the realm, but not of private custom.

Steyner v. Burgesse of Droitwich. 290

Witness to
bond denies de-
livery, hand
writing.

14. A witness to a bond admitted his hand, but said he did not see the obligation sealed and delivered. Lord Holt allowed the plaintiff to prove the bond by comparison of hands of the other witnesses, who was dead.

Blurton v. Toun. 291

Bill of work
done.

15. A bill delivered of work done, is an original, and not a copy; and accepting it, objecting to some particulars, admits the rest to be due.

Worrall v. Holder. 292

Ancient deed.

16. The execution of an ancient deed need not be proved by witnesses.

Lynch v. Clarke. 293

Witness read
paper.

17. Witness is not to read a paper for evidence, though he may look on it to refresh his memory; but if he swears he presently committed it to writing, and these are the very words, he may read it.

Sandwell v. Sandwell. 295

Printed pro-
clamation.

18. Printed proclamations, &c. may be given in evidence without comparing with the record.

Dupays v. Shepherd. 296

19. A

Halt.

19. A recovery of a debt not to be proved without the record. Recovery of debt.

Dupays v. Shepherd. Page 297

20. A shop-book good evidence, proving the hand, and the person dead who wrote it, &c. No proof necessary of delivery, &c. Shop book, hand, &c.

Pitman v. Maddox, 298, 300

21. The ordinary's register of a will, charging lands and former payments, good evidence on an avowry for a rent-charge devised to the plaintiff, who could not produce the will that belonged to the devisee of the lands. Register of will.

Anonymous. 298

22. A wife's declaration in her labour, no evidence in an action for getting her with child. Wife's declaration.

Adams v. Arnold. 298

23. A note given at the time of the contract, is *prima facie* evidence that it was received in payment. Note as payment.

Anonymous. 299

24. It is proper to give in evidence the usual course of dealing; as entries by brewer's clerk of delivering of beer. Course of dealing.

Price v. Lord Torrington. 300

25. A counterpart of a deed without other circumstances, is not sufficient evidence, unless in case of a fine. Counterpart of deed.

Anonymous. 301

26. The court above will not allow bills of exception to evidence, which were not taken during the trial. Bills of exception not taken at trial.

Wright v. Sharpe. 301

27. The consideration shall not be proved after a judgment upon a point tried. Otherwise, if the judgment was by confession. Consideration after judgment.

Sanders v. 327, 328

28. A sign is an evidence of an inn, though not essential to it. Inn.

Parker v. Flint. 366

- Holt.**
Release. 29. A man may plead a release, because it admits the contract; or he may give it in evidence, upon the general issue of *nil debet*. So of payment on *non assumpsit*.
Matton v. Morse. Page 395
- Jury give evidence.** 30. Jury may give a verdict upon their own knowledge, but they ought to tell the court so; and the fairest way would be to be sworn as witnesses.
The King v. Perkins. 404
- Depositions de bene esse.** **Salkeld.** 31. Depositions in chancery *de bene esse*, are good evidence at law, where the witnesses die before answer.
Howard v. Tremaine. 278
- Id.** 32. But no depositions *in perpetuam rei memoriam*, &c. are evidence in any case, as long as the witnesses live.
Tilley's Case. 286, 555
33. A general history is evidence to prove a matter relating to the kingdom in general, but not a particular right or custom. 281
- Herald's books, register.** 34. A year book, to prove the course of the court, and herald's books, to prove pedigrees, &c. are evidence. So parish registers.
Staine v. Burgesse of Droitwich. 281
- Record of sessions.** 35. A record of sessions may be evidence to prove the plaintiff had not taken the oaths, and so his office void.
Thurston v. Slatford. 284
- The matter of a record lost, proved.** 36. Also the matter of a record lost, may be proved by other evidence. 16. 285
(Vide Green v. Proude. 1 Mod. 117.)
- 'Nil tiel record.** 37. A printed statute no evidence upon *nil tiel record*.
Anonymous. 566
38. *Per Holt.*—An act printed by the King's printer, is allowed good evidence of the act to a jury, but was never allowed to be a record. You must get an exemplification under the great seal, and plead it exemplified, and then no man can deny it. 16.
- Recital of lease against releasor.** 39. Recital of a lease in a release, is evidence against the releasor and those claiming under him.
Ford v. Grey. 286

Salkeld.

40. But not against others, without proving there was such a deed, and that 'tis lost or destroyed. Not against others.

Ford v. Grey. Page 286

41. A counterpart no evidence of an indenture, unless old, or in case of a fine. Counterpart.

Anonymous. 287

(*Vide Bull. N. P. 225.*)

42. Sentence of the spiritual court in a cause within their jurisdiction, is conclusive evidence in the point tried. Other- Sentence, spiritual court,
wise of a collateral matter.

Blackham's Case. 290

(*Vide 2 Wils. 122.*)

43. The son took the father's money, and gave it to A. and the son's evidence admitted in *trover* against A. Son who gave money, &c.

Anonymous. 289

44. The heir at law may be a witness of the title, but the remainder man not. Heir at law, not remainder man.

Smith v. Sir Richard Blackham. 283

45. A brewer's book signed by a drayman that was dead, admitted to prove the delivery of beer. Brewer's book, delivery.

Price v. Earl of Torrington. 285

46. So a shop book was admitted as evidence, on proof of the servant's hand who made the entries, he being dead. Shop books

Pitman v. Maden. 690

47. An indenture of bargain and sale inrolled, may be given in evidence, without proving the execution. Bargain and sale enrolled.

Smartle v. Williams. 280

Lord Raymond.

48. Depositions taken by commissioners of bankrupts, cannot be used at a trial at common law. Depositions, commissioners of bankrupt.

Bredon v. Gill. 220

(*Arguendo.*)

49. Commissioners of appeal from the commissioners of excise ought not to proceed on the former depositions, unless the witnesses are dead, &c. Commissioners of appeal.

Ib. 222

1 Lord *Raymond*.

Books of college of physicians.

50. In an action of false imprisonment against the officers of the college of physicians, the court will not make a rule for the plaintiff to inspect their books.

Groenvelt v. Burrell. Page 253

Answer, evidence against those claiming under.

51. An answer in chancery is evidence of a deed against all that claim under that person; and reputation of claiming so is sufficient to put a party upon shewing another title.

Earl of Sussex v. Temple. 311

52. But in giving an answer in evidence, if it is read as the confession of a party, it must be taken altogether, and not that part only be read which makes against the party whose answer it is;—for the answer is read as the sense of the party himself; and if you take it in this manner, you must take it entire and unbroken: Therefore, if upon exceptions taken, a second answer has been put in, the defendant may insist to have that read to explain what he swore in the first answer.

Earl of Bath v. Bathurst. 5 Mod. 10. 1 Sid. 418

Infancy, coverture. *non est factum.*

53. Infancy is not evidence. *non est factum*, but coverture is.

Thompson v. Leach. 313

Parish books.

54. Where a person claims an interest against a parish, he shall not have a rule to inspect their books.

Cox v. Copping. 337

Warrant, evidence of writ.

55. A warrant upon a writ is evidence of the writ on behalf of the party arrested.

Robbins v. Robbins. 504

Custom-house books.

56. Motion for a rule to produce the custom-house books denied.

The King v. Worfenham. 705

Writing of deceased.

57. Writing of a dead person evidence.

Pyke v. Crouch. 730

Proof, will, admission of witness not sufficient.

58. Proof of a will cannot be made against a man by confession of his own witness;—the will itself ought to be produced, or other legal proof made. *Id.*

Verdict for third person.

59. A verdict may be evidence for a third person who claims a remainder by the same deed. *Id.*

60. What

1 Lord Raymond.

60. What a witness swore at a former trial, is evidence after his death.

What witness swore at former trial.

Pyke v. Crouch. Page 730

61. Property of the foil is evidence on the general issue, but not a particular right; as common, or easement, or way in another's foil.

Property of foil, but not easement.

Kent v. Wright. 732

62. If a special right may be given in evidence on the general issue in an action on the case.

Special right.

Ib.

63. A shop book kept by a servant that is dead, with proof that he was accustomed to make such entries, is evidence of the delivery of the goods.

Shop book.

Pitman v. Madox. 732

64. A shop book is not good evidence alone, unless for a stranger.

Alone not evidence.

Ib. 733, 745

65. Examination in chancery proved by the examiner.

Examination in chancery.

Goring v. Evelin. 734

66. An old survey taken by the proprietor of two manors, while they remained in his hands, may be given in evidence to prove the boundaries of one after it is conveyed away.

Old survey.

Bridgman v. Jennings. 734

67. In *riens per descens*, the heir gives an extent in evidence—he must prove a copy of the bond to the King.

Extent.

Sherwood v. Adderly. 734

68. Depositions in Chancery are evidence after the bill is dismissed.

Depositions, bill dismissed.

Smith v. Veale. 735

69. Confession of a pawnbroker's servant employed in the way of his trade, is evidence against his master.

Confession of servant.

Jones v. Hart. 738

70. The copy of the register of a will is not evidence to prove the will, nor to prove a pedigree, because that depends upon the credit of it's being a will; nor is the probate evidence for such purpose. *Per Holt.*

Register of will.

Dike v. Polhill. 745

(*Vide Bull. N. P.* 246.)

71. A

1 Lord Raymond.

Rule of court.

71. A rule of court is proved as an original writing.

Selby v. Harris. Page 745

2 Lord Raymond.

Hand of servant, delivery.

72. The hand-writing of a servant that is dead, to a delivery book, is good evidence of the delivery of goods.

Price v. Earl of Torrington. 873

Seal of court.

73. The seal of a competent court of justice, as of the ecclesiastical court to a probate of a will, or of a court of admiralty, &c. is conclusive evidence as to the property.

Green v. Waller. 893, 936

Witness became blind.

74. Depositions of a witness read who had become blind, and who had referred to his rental, and the witness also examined to what he remembered.

Kinsman v. Crooke. 1166

Deed of intail.

75. A deed of intail proved by an inquisition *post mortem*, finding it in *hec verba*.*Burridge v. Earl of Suffolk.* 1292

Indorsement on bond by obligee.

76. Indorsements on a bond by the obligee of payment of interest, allowed to be given in evidence by his administrator to take off the presumption from the length of time.

Serle v. Lord Barrington. 1371

Admittance of freeman.

77. An admittance of a freeman within two months after the time, and not signed, &c. not admitted in evidence.

The King v. Reeks. 1446*Strange.*

Lunacy.

78. Lunacy may be given in evidence on *non est factum*.*Yates v. Benn.* 1104

Witness in chancery becomes interested.

79. On an issue out of *chancery*, one of the witnesses after his depositions taken, became interested, and confessing it on a *voire dire*, was rejected. His depositions as if he were dead, were offered, but declared not evidence by the court.*Baker v. Lord Fairfax.* 10180. Where depositions had been taken *in perpetuum rei memoriam*, and the witness who made them afterwards became heir to the lands and was a party to the suit, they were held inadmissible.*Tilley's Case.* *Salkeld* 286

Strange.

81. A survey made by one party without the privity or concurrence of the other, is not evidence.

Anonymous. Page 95

82. Depositions of a witness examined fifty years before, not evidence without some account of his death.

Benson v. Olive. 920

Depositions
50 years old,
some account
of death.

83. An entry in an attorney's debt book read after his death.

Warren v. Greenville. 1129

Entry in at-
torney's book.

84. Corporation books must appear to be kept by the proper officer, or be proved to have been regularly kept.

The King v. Motherfell. 93

Corporation
books.

85. Copy of a letter found in one of the corporation chests and fifty years old, not evidence whether A. B. at the time he did a corporate act was an out-burgess or not.

The King v. Gwyn. 401

Copy of let-
ter, corporation.

86. *Postea* evidence of a trial, but not of a verdict, without shewing a copy of the final verdict, because it may happen the judgment was arrested.

Pitton v. Walter. 162

Postea, not of
a verdict.

87. The indorsement of interest being paid within twenty years, shall be given in evidence, though under the hand of the obligee.

Searle v. Lord Barrington. 826

Bond, interest
paid, indorse-
ment.

88. Indorsement made by obligee on an old bond after the presumption had taken place, not admitted in evidence.

1b.

Old bond,
obligee.

89. A special verdict between other parties not received in evidence of a pedigree.

Neal v. Wilding. 1151

Special ver-
dict.

90. Parol evidence may be given of the condition of records and the manner of keeping them, but not of the matter of them.

Leighton v. Leighton. 210

Condition of
record, not
matter of them.

91. What the guardian said admitted as evidence against the infant.

James v. Hatfield. 548

Declaration
of guardian.

92. Wife

Strange.

Wife owning receipt of money.

92. Wife owning receipt of money, no evidence against the husband.

Hall v. Hill. Page 1094

93. Where a copy is evidence, the court never will order the original to be produced, unless there is a suggestion of a rasure or a new entry. 307

94. In an action on a policy of insurance, the plaintiff produced a bill of parcels of one A. B. with his receipt to it, and proved his hand: held evidence against the insurers.

Ruffel v. Bobeme. 1127

95. Poll-books at an election are of a public nature, and a copy of them shall be good evidence. The originals shall only be produced on a suggestion of fraud or rasure.

Brocas v. Mayor of London. 307

96. In this case, *Keble* and *Rastal's* statutes differed; *Keble's* were proved to be examined with the parliament roll, and read.

Rex v. Jeffries. 446

97. The city books in which are entered the boundaries of the public market, are books of a public nature, and copies of them are evidence.

Warriner v. Giles. 954

98. Though an answer in chancery is evidence against the party himself, it is none against his alienee.

Ford v. Grey. *Salkeld* 286

99. In an action against an officer of the post-office, for interfering at an election, it is sufficient for the plaintiff to shew that the defendant acted as such without proving his appointment by the post-office.

Crew v. Saunders. 1005

(Vide 3 D. & E. 632.)

Sentence of spiritual court.

100. Sentence in the ecclesiastical court in a cause of jactitation of marriage, wherein the woman was declared free from all contract, is conclusive evidence till reversed by appeal.

Clews v. Bathurst. 960

101. Sentence

Strange.

101. Sentence of the ecclesiastical court is conclusive evidence on *non assumpsit* in an action upon a contract of marriage *per verba de futuro*—no evidence can be received of fraud or collusion in obtaining such sentence.

Da Costa v. Villareal. Page 961

(Vide *Salk.* 290. 2 *Wils.* 122. 3 *D. & E.* 639. *Croft v. Salter.* 2 *Str.* 1078. *Burton v. Fitzgerald.*)

102. Sentence of spiritual court in a cause of marriage, conclusive evidence.

Clews v. Bathurst. 960, 961

103. Affidavit of the deceased husband read in proof of the marriage.

Sacheverell v. Sacheverell. 35

104. What a witness swore who is since dead, evidence of a pedigree.

Pitton v. Walter. 162

105. In a question about the sanity of a testator, the coroner's inquest finding him lunatic, not proper evidence.

Jones v. White. 68

106. Heralds books and minutes of a visitation, evidence of a pedigree. *Ib.*

107. A verdict on a voidable trial read.

Leighton v. Leighton. 308

108. A libel read on confession of the defendant that he was the author, small variations excepted.

The King v. Hall. 416

109. In an action against a justice, he must shew the proceedings.

Hill v. Bateman. 711

110. A judgment of ouster against the magistrates before whom the defendants were sworn, proper evidence.

The King v. Hebden. 1109

111. Where an award is made to take in all matters, it shall not be admitted to shew that any thing was not taken into consideration.

Shelling v. Farmer. 647

112. No

Strange.

112. No parol evidence to explain a deposition.

Wilson v. Paulter. Page 794

113. No rule granted to inspect a corporation's private books.

Murray v. Thornhill. 717

114. Leave given to inspect books in which boundaries are entered.

Warriner v. Giles. 954

115. No access to books of post-office in collateral actions.

Crew v. Saunders. 1005

116. Books of a corporation may be inspected on disputes between the members, to which the corporation are no parties.

The King v. Fraternity of Hofsmen. 1223117. Wife *de facto* allowed to give evidence of the nullity of her marriage, though bigamy, in support of her action.*Westbrooke v. Stratville.* 79

118. In a trial of customary right to a fine, it was allowed as evidence that other tenants had submitted.

Duke of Somerset v. France. 659119. Customs of other manors given in evidence to determine the nature of tenants right estates. *Ib.* 659.

(N. B. The Judges of the Common Pleas, and the Barons of the Exchequer of contrary opinion.)

120. Customs in other manors or archdeaonries, not evidence.

Ruding v. Newell. 957*Hardwicke.*Conviction in
criminal case,
civil case.121. Lord *Hardwicke* lays it down as a principle, that a record of a conviction in a criminal cause, cannot be given in evidence in a civil one.*Gibson v. Mc.Carty.* 298

122. But

Hardwicke.

122. But upon an issue whether certain notes were forged or not, which were proved by *A. B.* though he would not allow his conviction for forging other notes to be given in evidence, yet he allowed the forged notes to be given in evidence. S. C. Sentence of the ecclesiastical court conclusive evidence where given in the plaint in issue.

Sentence,
ecclesiastical
court.

Chues v. Bathurst. Page 10

123. Lord *Hardwicke* thinks that a person that can answer truly to the *voire dire*, is a competent witness, and that a witness need not stand indifferent as a juror does.

Competence
of witness, of
juror.

The King v. Bray. 345

124. Where one acts by authority, after that authority is expired, he is a competent witness to prove the act of it; but it is otherwise in case of an office that gives an interest. S. C.

Person acting
under authori-
ty.

345

125. Lord *Hardwicke* says, he is always inclined in these cases to admit the witness, and let the objections go to his credit. S. C.

Credit.

345

126. An ancient survey from the first fruits office of the possessions belonging to a nunnery, which survey was taken in the year 1563, upon the dissolutions of monasteries, tho' it did not appear by what authority that survey was taken, held good evidence.

Vicar of Kellington v. Masters and Fellows of Trinity College Cambridge. 1 *Wilson* 170.

2 *Wilson.*

127. In dower, the marriage must be tried by the bishop's certificate.

Certificate of
bishop.

Robins v. Crutchley. Page 122

128. In a question on a presentation by a patron to a living, the presentation under the hand and seal of the patron must be produced as better evidence than the bishop's institution book.

Id.

Tillard v. Shebbeare. 366

1 *Wilson.*

129. In an action against a stranger for disturbing the plaintiff in his pew, it need not be proved that the plaintiff repaired it; *aliter*, in a dispute with the ordinary.

Kenrick v. Taylor. 326

130. Two

2 *Wilson*.

130. Two allowances in *eyre*, and one judgment in *ref-*
pals 400 years ago, are not conclusive evidence against *usage*
 for 92 years last past, to have *wreck* of the sea.

Farmer v. Arthur. Page 23

131. In an action upon the case against two, upon a joint
 undertaking to cure the plaintiff's leg, it was proved they
 both acted together, and held sufficient evidence of their
 joint undertaking without any express proof of a joint under-
 taking.

Slater v. Baker. 361

1 *Blackstone*.

Time of suing
 writ.

132. In *trover*, evidence may be given of the real time
 of suing out the writ, so as to avoid the relation to the first
 day of term.

Morris v. Harwood. 320

Custom,
 merchants.

133. Evidence of the general opinion of merchants allow-
 ed to be given, to prove the custom of merchants.

Camden v. Cowley. 417

Confession of
 forgery.

134. Confession of forgery by a dead witness may be ad-
 missible evidence.

Lessee of Clymer v. Littler. M. 2 Geo. 3. 346

Witness to
 will.

135. Subscribing witnesses to a will, who swear to the
 testator's incapacity, contradicted by other evidence.

Lowe v. Jolliffe. T. 2. Geo. 3. Page 365

Executor in
 trust.

136. An executor in trust, who has acted, may be ex-
 amined as a witness to establish the will. *Id.*

Parol objec-
 tions to will.

137. Parol objections to a will may be encountered by
 parol evidence.

Jones v. Newman. T. 24 Geo. 2. 60

Correspon-
 dent, hand-
 writing.

138. A correspondent is sufficient evidence to disprove a
 man's hand, though he has never seen him write.

Gould v. Jones. T. Vacation, 2 Geo. 3. 384

2 *Blackstone*.

Parol evi-
 dence, addi-
 tional rent.

139. Parol evidence is not admissible to prove an addi-
 tional rent payable by a tenant, beyond that expressed in
 the written agreement for a lease.

Preston v. Merceau. H. 19 Geo. 3. 1249

140. Office

2 Burr.

140. Office copies in the same court and in the same cause, are equivalent to the record itself. Office copies.

Denn v. Fulford. Page 1179, 1181

141. In another court, or in another cause in the same court, the copy must be proved. *Ib.* 1179 In another court.

142. Each party in a cause in chancery, though he must take an office copy of the adverse pleadings, may read the draught of his own. *Ib.* Office copy, adverse pleadings.

143. *Per Lord Mansfield.*—The reason that answers in chancery must be signed is, with a view to the more easy discovery of perjuries in them. It is sufficient proof of the actual swearing by the person charged, to produce the *jurat* attested by the proper officer: at least it is sufficient to put the defendant on proof that he was personified.

The King v. Morris. 1189

3 Burr.

144. Mere *hearsay* evidence is not admissible; but evidence that a subscribing witness to a will or instrument, acknowledged upon his death-bed to the person giving evidence, that he the subscribing witness, did himself forge it, is admissible at a trial, though objected to—much more shall it stand unimpeached if it came out upon cross-examination, and was not objected to at the trial. Acknowledgment on death-bed.

Wright v. Littler. 1255, 1256

4 Burr.

145. Production of a deed shall not be required from the defendant in criminal or penal cases, even though he should hold it in his hand in court; but in *civil* cases the court will either force the party to produce it (after proper notice), though it prove against him, or leave his refusal to the jury as a strong presumption. Production of deed, criminal, civil case.

Roe v. Harvey. 2489

(*Vide* 2 D. & E. 201.)

146. In an action for bribery at an election to parliament, on 7, 8 W. 3. c. 25. the time of delivering the precept to the returning officer, needs not to be proved; for the time of delivering it, though material to the returning officer, is immaterial to this third person.

Grey v. Smithyes. 2276

147. Production

Douglas.

147. The copy of a marriage register is good evidence.
Page 166, 572 n.

148. And of depositions before commissioners of bankrupt, when worded according to 5 Geo. 2. c. 30. s. 41.
245

149. And of entries in the journals of parliament.
572 & n.

150. And of the transfer books of the *East India Company*.
572

151. And wherever the original is of a public nature, though not a record.
Ib.

Cowper.

152. A copy of the journals of the House of Lords, is evidence of the reversal of a decree.

Jones v. Randall. 17.

Parol evidence, cancelling will.

153. Parol evidence must be let in to explain the intent of the testator in cancelling a will.

Burtonshaw v. Gilbert. 53

Delivery of writ.

154. In debt for an escape, against the sheriff, the indorsement of *non est inventus* upon the *ca. sa.* is sufficient evidence of its having been delivered to him.

Blatch v. Archer. 63

155. A legal arrest must be proved in such action.

Ib.

156. The bailiff's name endorsed on the writ, is sufficient evidence that he was authorized by the sheriff to arrest, without proving the warrant.
Ib. 66

Declaration of parent.

157. General declarations of a parent, are good evidence after his or her death, to prove that a child was born before marriage, but not to prove that a child born in wedlock, is a bastard.

Goodright v. Mejs. 591

Answer of parent to bill, birth of child.

158. So the answer of one of the parents to a bill in chancery, is admissible to prove such birth; for it is not like offering a deposition or an answer in evidence, against a person not a party to the original suit, but it is offered only as evidence

evidence under her hand, of her having made such a declaration.

Goodright v. Moss. Page 594

Cowper.

159. So parents may be admitted to prove the fact of the marriage, on a question upon the legitimacy of the child. Parents prove marriage.

Ib. 593

160. But not to prove *non access.* *Ib.* 594 Access.

161. Traditions are evidence in questions of pedigree. Traditions, *Ib.* pedigres.

162. So are *circumstances* that shew *illegitimacy.* *Ib.* Illegitimacy.

163. So is an entry in a family bible, an inscription on a tomb-stone, or a pedigree hung up in the family mansion. Inscription, tomb-stone. *Ib.*

164. *Indecency* of evidence is no objection to its being received, where it is necessary to the decision of any civil or criminal right. Indecency of.

Da Costa v. Jones. 734

165. *Secus*, if it arise upon a voluntary wager between two indifferent persons ; as upon a wager concerning the sex of a third person. Wager. *Ib.* 736

166. Is a question upon the custom of *tithing* in the parish of *A.* evidence that such a custom exists in the adjacent parishes, is not admissible. *Secus*, if the custom be laid as the general custom of the whole country. Custom in parish.

Furdeaux v. Hutchins. 807

Douglas.

167. The endorsement by the proper officer, is sufficient evidence of the enrolment of a bargain and sale. Enrolment.

Kinnerfley v. Orpe. 57, 58

168. Matter of defence happening after the action brought, but before plea pleaded, may be given in evidence, in those actions where special matter may be proved on the general issue. Matter of defence after action brought.

Sullivan v. Montague. 105 to 108

169. An executor who takes no beneficial interest, is a competent witness to prove the testator's sanity. Executor, sanity of testator.

Goodtitle v. Welford. 134, 136

170. If

Douglas.

Release, refusal to accept.

170. If a person interested execute a surrender or release, he is an admissible witness, although the surrenderee, &c. should refuse to accept the surrender, or release.

Goodtitle v. Welford. Page 135, 136

Executor.

171. It is no exception to an executor's testimony, that he may be liable to actions as executor *de son tort*.

Id. 136

Demurrer to evidence.

172. On a demurrer to evidence, any fact which the jury could infer in favour of the party offering it, from the evidence demurred to, is to be considered as admitted.

Cockfedge v. Fanshaw. 119

Register, marriage.

173. The minister and subscribing witnesses to the register, are not the only competent witnesses to prove the identity of the persons married.

Birt v. Barlow. 162, 166

Custom, proof of.

174. One who has acted in breach of an alleged custom, is not a competent witness to disprove the custom.

Company of Carpenters v. Hayward. 359, 360

Trade, mode of conducting.

175. To prove the manner of conducting a particular branch of trade at one place, evidence may be given of the manner of conducting the same branch at another place.

Noble v. Kennoway. 492 to 495

Custom of manor.

176. Evidence of the custom of one manor, is not admissible to prove the custom of another manor. *Id.*

177. Sworn copies of the entries in the journals of the House of Commons, were admitted as evidence on the part of the crown.

The King v. Lord G. Gordon. 569

Evidence read against party.

178. Instances where a party offering what is not the best evidence, it shall be read if it make against him.

Bermon v. Woodbridge. 752, 753

Averments immaterial, impertinent.

179. Allegations of facts impertinent to the cause, are surplusage, and need not be proved.

Bristow v. Wright. 642

Id.

180. Such allegations will be struck out upon motion, and costs allowed. 642

181. Allegations

Douglas.

181. Allegations of facts immaterial, but relative to the title of the party, though not necessary, yet when introduced must be proved; otherwise the plaintiff will be nonsuited. *Brislow v. Wright.* Page 641 to 644

Averments immaterial, impertinent.

182. (In the case of *Brislow v. Wright*, an action was brought against the sheriff, for taking goods without paying the landlord a year's rent; the particulars of the demise were alleged in the declaration: such allegation was needless; but being stated and not proved, the verdict was therefore set aside, and judgment of nonsuit entered. See also *Cartb.* 202. 2 B. 1101, & 3 *Dur.* G E. 645.—— The distinction between immaterial and impertinent averments, is thus explained in a late opinion given by a gentleman of eminence in the profession. "If the plaintiff allege matter in his declaration which is altogether impertinent to his cause, he is not bound to prove such matter at the trial; because the merits of the question cannot be affected by such impertinent matter, and because the action in itself, cannot possibly be founded upon such impertinent matter. But where the plaintiff alleges matter in his declaration, which although not necessary to be stated, is nevertheless not impertinent to the foundation of his action, but is immediately connected with it, and is only immaterial to the general form of it, there he is bound to prove such matter at the trial of his cause; because by his own conduct, he has taken upon himself the burthen of proving his charge in that particular form which he has chosen to adopt.)

1 *Durnford and East.*

183. If an issue had been tried in an action by a commoner, on a right of common, upon a custom extending over the whole manor, a verdict on that issue would be evidence in another action by another commoner, respecting the same right of common. *Aliter*, where the common is claimed as belonging to a particular estate. *Per Buller, J.* *Walton v. Shelley.* 302

Action by one commoner, verdict.

2 *Durnford and East.*

184. A deed coming out of the hands of the opposite party, after notice to produce it, must *prima facie* be taken to be duly executed, and will be received in evidence without proof of the execution.

Deed out of hands of opposite party.

Rex v. The Inhabitants of Middlebury. 41

185. Declarations of tenants are admissible evidence after their death, to shew that a certain piece of land is parcel of the estate, which they occupied; and proof that they exercised

Declaration of tenant.

cised acts of ownership in it, not resisted by contrary evidence, is decisive.

Davies v. Pierce. Page 53

2 *Durnford and East.*

Declaration
of tenant.

186. Where the plaintiff claimed as devisee in remainder, under a will twenty-seven years ago, under which there was no possession, declarations by the tenant who was in possession at that time, that he held as tenant to the deviser, are admissible evidence to prove seisin in the deviser.

Holloway v. Rakis. 55. Cited *ib.*

187. There is no difference between civil actions and criminal prosecutions, as to the evidence of papers; in neither case is the party bound to produce evidence against himself; but even in a criminal prosecution, notice may be given to him to produce papers in his possession, and in case of his refusal or neglect, other evidence may be given of their contents.

The Attorney-General v. Le Merchant. 201. (In note.)
(*Vide 4 Burr.* 2489.)

Id.

188. And notice to the defendant's agent or attorney in such case, is sufficient. *ib.*

Affidavits,
title of cause.

189. Where affidavits were produced without any title of the cause, the court would not allow them to be read, though the council on the other side was willing to waive the objection.

Owen v. Hurd. 644.

3 *Durnford and East.*

Consideration
of deed, parol
evidence.

190. Where the consideration expressed in a deed of conveyance, under which the parter claimed a settlement, was £.28, parol evidence was admitted to prove that £.30 was the real consideration.

Rex v. Scamondan. M. 30 Geo. 3. 474

Parson, insti-
tution, &c.

191. In an action for non-residence, evidence that the defendant did several acts as parson, such as receiving tithes, &c. is sufficient, without proving his admission, institution, and induction.

Bevan, Q. T. v. Williams. E. 16 Geo. 3.
ib. in note. 635

License.

192. In an action on the post-horse act, against an inn-keeper for penalties incurred, it is not necessary to shew the licence itself to the defendant; but as against *his* other evidence

evidence is sufficient, as that he had written over his door,
"Licensed to let post-horses."

Radford, Q. T. v. Briggs. E. 30 Geo. 3. Page 637

3 *Durnford and East.*

193. Upon a libel in the consistorial court, for a disturbance in the plaintiff's right to a pew, the court adjudged the right to be in the plaintiff, and admonished the defendant not to sit in the pew; the court of arches *reversed* the sentence, but also admonished the defendant not to use the pew again. These sentences were held not conclusive evidence of the plaintiff's right, in an action for a disturbance between the same parties.

Sentence of court.

Cross v. Salter. E. 30 Geo. 3. 639

194. If a plaintiff alledge any thing which forms a constituent part of his title, he must set it out correctly—but here it was immaterial to state what the rent was, and therefore it need not be proved.

Immaterial, irrelevant matter.

Gwinnet v. Philips. 643

195. But with respect to actions on contracts, there the whole of the contract must be proved, which is set out. The same of records.

Contracts.

196. *Quere*, If there be any other instance in which hearsay evidence is admissible, but these two, namely, the cases of pedigrees and prescriptions.

Hearsay evidence, where admissible.

The King v. Inhabitants of Eriswell. 707

197. A witness may refresh his memory by any book or paper, if he can afterwards swear to the fact from his own recollection; but if he cannot swear to the fact from recollection any further than as finding it entered in a book or paper, the original book or paper must be produced.

Witness refresh his memory.

Doe d. Church v. Perkins. T. 30 Geo. 3. 749

4 *Durnford and East.*

198. Where the right to the soil is in issue, entries written in a book by the steward of a former owner, from whom title is derived, of receipts of money by the steward for that owner, as a satisfaction for trespasses committed on the place in question, are admissible evidence, if the steward be dead.

Entries of steward.

Barry v. Bebbington. 514

199. So an entry of the receipt of money by officers of a township from the officers of another township, of a proportion of church rates made in a parish book, is evidence to

Entries in parish books

charge the latter officers with the same proportions in future.

Stead v. Heaton. Page 669

4 *Durnford and East.*

Entries in parish book.

200. And another entry explaining the proportions made on the same page, is also admissible evidence. *Id.*

Usage in construction of charter.

201. Contemporaneous usage may be given in evidence in order to construe a charter.

The King v. Bellringer. 821

202. Affidavits filed in one cause may be read as evidence in another, and to affect persons not parties to the cause, as the attorney, officers, &c. *Per Lord Kenyon.* 290

Bastard, non-access.

203. The child of a married woman may be proved a bastard by other evidence than that of the husband's non-access.

Goodright v. Saul. 356

Id.

204. *Ashurst, J.*—The circumstance of the husband constantly residing at a distance from his wife, though within the realm; and that forcible circumstance of the son having taken a different name from his birth, the name of the person with whom his mother was living at the time, and which had been retained by him and his descendants ever since,—were strong to rebut the presumption of access, and to shew that the son was a bastard. *Id.*

5 *Durnford and East.*

205. The mutiny act enables two justices to take the examination of a soldier respecting his settlement, and directs them to give an attested copy of it to the soldier, to be by him delivered to the commanding officer in order to be produced when required, and make such attested copy evidence. It was held that no other attested copy of the original examination than that given to the soldier, is evidence.

R. v. The Inhabitants of Clayton le Moors.

Trin. 34 Geo. 3. 704

206. *Quere,* Whether such an original examination be evidence. 707, 708

207. Evidence of the lessee's having accounted with the lessor, and paid him the share of the money produced by the sale of coal elsewhere, is not admissible to explain the intention of the parties. *Id.*

208. The

H. Blackstone.

208. The verbal declarations of an auctioneer at the time of the sale, are not admissible evidence to contradict the printed conditions. Declarations of auctioneer.

Gunnis and others v. Erhart. M. 30 Geo. 3. Page 289

209. A. having given a bond to B. for the payment of money, which it is understood between them is to be applied towards indemnifying B. from the expences of an election in which B. is a candidate. In an action brought by C. against D. for money advanced and services performed in supporting the interest of B. at the request of D., A. is not a competent witness. Witness competent.

Treluxny v. Thomas. Mich. 30 Geo. 3. 308

210. Plaintiff declared in debt on a judgment of Trinity Term 1787, and on *nil tiel record* pleaded, the record was brought into court, and appeared to be the record of a judgment of Easter Term 1788. This was adjudged to be a failure of record.

Rastal v. Stratton. 49

2. H. Blackstone.

211. On a demurrer to circumstantial evidence, the party offering the evidence is not obliged to join in demurrer, unless the party demurring will distinctly admit upon record every fact and every conclusion which the evidence offered conduces to prove. Demurrer to;

Gibson and Johnson v. Hunter. 187

Ver. and Scr.

212. Before a party can be permitted to give evidence of the contents of a deed, he must prove the loss of it. Deed lost.

263

213. Parol evidence is not admissible to shew that a testator intended to exempt his personal estate from the payment of debts. Parol evidence, will.

327, 328, 482.

214. The recital of articles before marriage, and of payment of part of the wife's portion as a consideration, in an old settlement made after marriage, is *prima facie* evidence of the articles and of the payment, and therefore that the settlement was not voluntary; and there being no evidence to contradict it, the judge is right in directing the jury to find for the settlement. Rental in deed.

388

215. But

Ver. and Scr.

215. But it cannot be extended to conclusions as to matters not of record, to be drawn from that to which the evidence does not apply, and which lying merely in the supposed knowledge of the jury, the court not being possessed of any material to judge upon, could form no opinion of.

Page 453

216. Demurrer to evidence has fallen into disuse, because it leaves to conjecture what might or might not have been inferred by a jury. 437, 438

217. It does not preclude the party against whom it is offered, from any legal defence, though it may sometimes furnish against the party demurring the admission of a stronger conclusion in point of fact, than a jury might have drawn if it had been permitted to decide. 452

218. Upon an ejectment no special issue is joined, the whole of the title of the parties is opened by the general issue, and the evidence must be applicable, and applied to every matter to which the title adduced extends. 458

219. Therefore in such actions (and for money had and received) the court upon a demurrer to evidence is to take it that the evidence was applied to what would support the party's title, and to every thing the party giving it seeks by his action. 429

220. Demurrer to evidence admits not only those facts which are directly sworn to and stated on the record, but all conclusions of facts to which the evidence is admissible, and to which it is properly relevant and applicable. 454

221. If the evidence be relevant and applicable to a particular conclusion, and fit to go to the jury thereupon, that conclusion is admitted. It is for the court to decide whether the evidence has any reference to such a conclusion, but if in the opinion of the court it has such reference, the court cannot weigh the credibility of witnesses, or the truth or probability of facts; the party is to be in as good a situation as if he had a special verdict, comprising all those facts expressly found, which might properly have been inferred from the evidence. 455

Espinasse, Cases at N. P.

Comparison
of hands.

222. Evidence of hand-writing from comparison of hands, not admissible.

Stranger v. Searle. 14

223. A

Espinasse, Cases at N. P.

223. A witness shall not be permitted to prove a writing not to be a party's hand-writing, from only having seen such party write in his presence while the action was depending. Seeing the party write in court.

Stranger v. Searle. Page 15

224. The common seal of the city of *London* proves itself. Seal of city.

Doe v. Mason. 53

225. Variance between the judgment roll and the *nisi prius* roll fatal, where the former is to be given in evidence. Judgment roll, *nisi prius* roll.

The King v. Eden. 93

Execution.

Writ first
executed.

Holt.

1. **T**HE writ first executed, shall stand, and the party is driven to his remedy against the sheriff.

Smalcomb v. Buckingham.

Page 303

Salkeld.

Execution in
life of testator.

2. Execution on a *fi. fa.* in the life of the testator, gives a right to the executor.

Williams v. Carey.

12

Sheriff that
begins ends.

3. The sheriff that begun the execution shall end it, though his office expires.

Clerk v. Withers.

323

Seizure, dis-
charge of per-
son.

3. And a seizure of goods by the sheriff in execution, deveys the defendant's property, and discharges his person.

Id.

5. A *fi. fa.* is *de bonis et catallis debitoris*, and therefore under it, the debtor's goods only can be taken in execution; but a *levari facias* is *de exitibus terra*, and therefore under it, the sheriff may take the cattle of a stranger, *levant* and *couchant*; for they are the issues of the land, and the land is debtor.

Britton v. Cde.

395

6. Two *fi. fa.*'s delivered the same day to the sheriff, who executes the last first; the execution is good, but the sheriff is liable to the plaintiff in the first.

Smalcomb v. Buckingham.

320

7. Judgment in trespass against four, who bring error, and one dies; the plaintiff cannot sue execution *sans* suggesting the death upon record, but he need not sue a *scire fa.*

Rennoir v. Brace.

319

8. Note, a *fi. fa.* abates not by the plaintiff's death.

Clerk v. Withers.

322

9. If

¶ Lord Raymond.

9. If a writ of execution is delivered to the sheriff, and the defendant becomes a bankrupt before it is executed, the execution is thereby superseded.

Page 252

(V. 1 D. & E. 475, in trespass.)

10. On an *elegit* the sheriff may deliver the goods to the plaintiff, but not on a *scire facias*.

Pullen v. Purbecke. 346

11. Where the sheriff returns the delivery of more than a moiety upon an *elegit*, the execution is void, and the plaintiff shall have a *scire facias* for a new execution.

Pullen v. Birbeck. 712

12. Seizing part of the goods in a house on a *scire facias*, in the name of the whole, is good.

Coke v. Davies. 725

¶ Lord Raymond.

13. Where one of the plaintiffs or defendants, dies after judgment, execution may be sued upon suggestion of the death.

Witbers v. Harris. 808

14. A *fieri facias* bearing teste before the defendant's death, may be executed upon the goods in the hands of the executors.

Qdes v. Woodward. 850

15. A *fieri facias* out of the common-pleas, is executed before error brought, the common-pleas shall award the *venditioni exponas*.

The Queen v. Nash. 999

16. By seizing goods on a *fieri facias*, the debt is discharged, and payment to the sheriff is good.

Clerk v. Witbers. 1072

17. Seizing goods on a *fieri facias* will not discharge a co-obligor, unless the goods are sold, and the plaintiff satisfied.

Ib.

18. The sheriff may sell goods seized on a *fieri facias*, after he is out of his office, without a *venditioni exponas*.

Ib. 1073

19. A

2 Lord Raymond.

19. A *scire facias* may be executed after the death of the plaintiff.

Clerk v. Withers. Page 1073

20. An *elegit* sued out by an executor, cannot be executed on behalf of an administrator, *de bonis non*.

Ib. 1075

21. The sheriff is bound to answer the returned value of the goods, though they are afterwards rescued.

Ib.

22. After an *elegit* executed upon goods, and a return that the defendant has no lands, the plaintiff may have the body in execution, for the remainder of his debt.

Lancaster v. Fielder. 1451

Stranger.

Capias after
alegia

23. A *capias ad satisfaciendum* may be had after an *elegit* executed only on goods.

Bacon v. Peck. 226

Scire facias,
injunction.

24. Not to be had without *scire facias*, where the plaintiff has been delayed a year by an injunction.

Winter v. Lightbound. 301

Extent, partial
eviction,
re-extent.

25. If after an extent and a partial eviction, the comtee can have a re-extent in another county.

Oates v. Robinson. 461

Extents in
different coun-
ties.

26. Where extents are to be executed in different counties, they must be prayed at the same time.

Ib. 462

Extent for
King's debt.

27. An extent for the King's debt cannot be antedated, but must bear teste at the day it issues, though it be out of term.

The King v. Mann. 749

Misnomer.

28. If the defendant omits to plead a misnomer, he may be taken in execution by the wrong christian name.

Crawford v. Satchwell. 1218

Hardwicks.

29. A court of law may set aside an execution, if contrary to the parties agreement; but if the person against whom it is taken out, insists on some equitable circumstances, the courts of law will not interfere.

Francis v. Nash. 48

30. Bank

Hardwicke.

30. Bank notes cannot be taken in execution.

Bank notes.

Francis v. Nash.

Page 48

31. Whatever may be assigned or granted, may be taken on an execution.

Whatever may be assigned, or granted.

Blackstone.

32. Though possession be regularly taken, the officer must remove the goods to a place of safety; otherwise he is a trespasser *ab initio*.

Reed v. Harrison.

1318

Douglas.

33. The sheriff on an *elegit*, is not bound to deliver a moiety of each particular tenement and farm, but only certain tenements and farms, making in value a moiety of the whole.

Elegit.

Den v. Earl of Abingdon.

456 to 459

34. The land extended under an *elegit*, must be set out by metes and bounds.

Metes and bounds.

Id. 459, &c.

35. If a plaintiff cannot find sufficient effects to satisfy his judgment, the court will order the sheriff to retain for his use money which he has levied in an action at the suit of the defendant.

Money levied at suit of defendant.

Armistead v. Phelps.

319

Durnford and East.

36. An execution against the goods of a bankrupt, taken out after his certificate is signed by his creditors, and before it is allowed by the chancellor, is void.

Against bankrupt after certificate signed.

Callen v. Meyrick.

361

37. The stat. 5 Geo. 2. c. 30, only relates to the discharge of the person of the bankrupt, who is in custody on a judgment obtained before the allowance of the certificate.

Bankrupt.

Id.

38. Where two writs of *fiery facias* against the same defendant are delivered to a sheriff on different days, and no sale is actually made of the defendant's goods, the first execution must have the priority, even though the seizure was first made under the subsequent execution.

Two writs, first execution.

Hutchinson v. Johnston.

722

39. And

Sheriff paid
the amount.

1 *Durnford and East.*

39. And if the person claiming under the second execution, pay the sheriff the amount of the debt under the first execution for his security, the court will not compel the sheriff to refund the money on motion.

Hutchinson v. Johnson.

Page 729

Bill of sale.

40. But where the sheriff had given a bill of sale to the person claiming under the second execution, that was held to bind the sheriff.

Rybot v. Peckham. (In note.)

731

Statute of
frauds.

41. The statute of frauds only secures the possession of innocent vendees under an execution; but as to the rest of the world, the goods are bound from the delivery of the writ to the sheriff.

Hutchinson v. Johnson.

729

2 *Durnford and East.*

Escape, volun-
tary return.

42. A voluntary return of a prisoner after an escape, before action brought, is equal to a retaking on a fresh pursuit, but it must be pleaded.

Bonafous v. Walker.

126

Negligent
escape, fresh
pursuit.

43. Under a count for a voluntary escape, the plaintiff may give evidence of a negligent escape; and the defendant may plead a retaking on a fresh pursuit to such a count, without traversing the voluntary escape. *Ib.*

44. An escape from the rules of the King's-bench prison, without the marshal's knowledge, is not a voluntary escape. *Ib.*

Bailiff of li-
berty, escape.

45. The bailiff of a liberty who has the return and execution of writs, is liable to an action of debt for an escape, if he remove a prisoner taken in execution to the county gaol situate out of the liberty, and there deliver him into the custody of the sheriff.

Beethman v. The Earl of Surry.

5

46. In actions on simple contracts, and judgments for a debt certain, the expences of levying must be paid by the plaintiff; so that if the sheriff overcharge, the plaintiff is the party grieved, under 29 *Eliz. c. 4.* which limits sheriff's fees. But if the judgment be for a penalty, the defendant must pay the expences of levying, and is the party grieved if the sheriff overcharge.

Woodgate v. Knatchbull.

157

47. Nothing.

2 *Durnford and East.*

47. Nothing but the poundage can be taken by the sheriff, under 29 *Eliz. c. 4.* for levying an execution.

Woodgate v. Knatchbull. Page 148

48. Where a person against whom a writ of *feri facias* is taken out, is in possession of goods under a deed which was given in consideration of an antecedent debt, and a small annuity payable therefrom, the sheriff is warranted in returning *nalla bona*, if it appear that the memorial of such annuity was not registered according to the directions of the annuity act 17 *Geo. 3. c. 26. s. 1.* for in that case the deed is absolutely void.

Crosley v. Arkwright. 603

3 *Durnford and East.*

49. In pleading the taking of a term under *feri facias*, it is sufficient to state, that the party was possessed of a certain interest in the residue of a certain term of years.

Faylor v. Cole. 292

4 *Durnford and East.*

50. If goods be taken in execution on a *feri facias* against the King's debtor, and before they are sold, an extent came at the King's suit, grounded on bond debt tested after the delivery of the *feri facias* to the sheriff; these goods cannot be taken upon the extent.

Extent at
King's suit.

Rorke v. Dayrell. 402

Veri and Sc.

51. Return of a delivery of a moiety, without saying that it was by metes and bounds, is a good return to an *elegit*.

Elegit.

231, 233

52. Return of a delivery of a moiety by metes and bounds, is a good return to an *elegit*.

Metes and
bounds.

234

53. There are seven sorts of executions: upon statute merchant; 2. upon a statute staple; 3. upon a recognizance; 4. an *elegit*; 5. upon a *capias ad satisfaciendum*; 6. a *feri facias*; 7. a *levati*.

26

54. Where heir confesses assets, the land itself might be delivered to the creditor, except the creditor were excluded by law from holding land.

26

55. The Sheriff withholding money levied on an execution after demand, is liable to pay interest for it at the rate of 10 per. Cent. and treble costs.

92

Executor.

Executor.

Nature of
office.

To whom ad-
ministration.

1. **A**N executor is he to whom another man commits by will the execution of that his last will and testament. All persons are capable of being made executors that are capable of making wills; and many others, as *feme coverts*, infants (even unborn), but infants cannot act till seventeen. The appointment of executor is essential to a will; if none are named, the ordinary must grant administration *cum testamento annexo*. The ordinary is compellable to grant administration of the goods and chattels of the wife to the husband, or his representative, and of the husband's effects to the widow or next of kin. 2. Among kindred, the nearest in degree are to be preferred. 3. The nearness is to be computed by the rules of the civil law:—first, children; if none, parents; then brothers, grandfathers, uncles or nephews, and the females of each class respectively. 4. The half blood is admitted. 5. If none of the kindred will take out administration, a creditor may.—In the case of bastard, the usual way is to procure letters patent or other authority from the King, and the ordinary grants administration to the appointee.

2 *Black. Com.* Page 503, 504

2. The power of an executor is founded in the special confidence and actual appointment of the deceased; therefore he is allowed to transmit that power to another.

Id. 506

Holt.

De son tort.

3. Executor of his own wrong is he who gets goods of the intestate into his hands before administration granted, and takes upon him to act as executor.

Anonymous. 44

Apprentice.

4. The executor is liable in covenant, if he doth not instruct the apprentice or find him another master.

Peck's Case. 67

5. The power of the husband to dispose of the wife's estate, does not make a title in him; and though the husband may dispose of a term which he hath in right of his wife,

wife ; yet if he become a bankrupt, the commissioners cannot assign over this estate.

Lutting v. Browning. Page 105

Holt.

6. A right of action or *chese in action* will go to executors. 256

7. Executor of tenant in dower cannot maintain a *sci. fa.* upon the recognizance to pay the mesne profits upon stat. 17 *Of tenant in dower.*
Car. 2. for want of a judgment for the damages.

Mordant v. Thurald. 305

8. Where an executor is named, the ordinary cannot grant administration to another except in case of absolute necessity, as *non sane* memory. Executor named, administration to another

Hill v. Mills. 305

9. Bankruptcy is not a material disability in an executor, for he acts in *auter droit*, and the testator has entrusted him. Bankruptcy of. 16.

10. In case on *plene administravit*, the plaintiff must prove the debt, or he shall recover but a penny damages, though there be assets ; for the plea admits the debt, though not the quantity of it. *Plene administravit.*

Skellay's Case. 306

11. All separate debts to the testator mentioned in the inventory, to be counted assets. Separate debts, assets. 16.

12. What disbursements for funeral, &c. allowable, &c. Disbursements allowed. 16.

13. A statute may be paid when a judgment is suspended by writ of error. Statutes, judgment. 16.

14. Whether an executor may be charged in pleading as administrator, or *vice versa*. Charged as administrator. 16.

Baewer v. Cook. 307

15. At common law an administrator was suable as executor. 16.

16. If an executor has a term of less value than the rent, and is charged in the *debet* and *detinet*, he may plead the special matter, i. e. that he has no assets, and the land is of less value, &c. Term of less value than the rent. 16.

Billingham v. Sperman. 306

17. Executor

Funeral ex-
penses.

Holt.

17. Executor not liable to funeral expenses, unless he contracts for them.

Hilton v. Sherman. Page 309

Bond debt,
rent, equal
degree.

18. Debt upon a bond and rent (whether by a parol, or lease by deed) of equal degree.

Cage v. Abon. 309

Ordinary put
terms on exe-
cutor.

19. The ordinary cannot refuse the executor for his poverty, nor put terms upon him because the testator has put no terms.

The King v. Rainet. 310

20. In equity he is but a trustee for legatees, and ought to give security if insolvent: chancery will in such cases; injoin an executor not to intermeddle. *lb.*

Pleading
judgments.

21. He must plead all his judgments, or he loses his right of preferring them; for the pleading of the judgments is a protection of the assets, till they are satisfied.

Atfield v. Parker. 310

Pleads false
judgment.

22. Pleading one false or fraudulent judgment, saddles him with the whole debt. *lb.*

Obligee, obli-
gor, executor.

23. Whether the debt be released or extinguished, where the obligee makes the obligor his executor.

Wankford v. Wankford. 311

24. *Per Holt.*—When the obligee makes the obligor his executor, although it is a discharge of the action, the debt is assets; and the making him executor does not amount to a legacy, but to payment and a release. *lb.*

Executor,
administrator.

25. The rights of executors and administrators, differ from the ordinary; the right of the executor is from the testator of the administrator. *lb.* 312

Several exe-
cutors, one
administers.

26. If several executors are appointed, they may all refuse; but if one administers, the rest cannot refuse the executorship; but they must all be named in actions brought in right of the testator, notwithstanding such refusal. Any of them may release a debt. *lb.*

Executor of
executor.

27. Executor of executor is executor to the first testator. *lb.*

28. Executor

Holt.

28. Debt against two executors, and only one appears, Debt against judgment shall be given against all the executors for the two, one ap- goods of the testator. pears.

Rouse v. Etherington. Page 313

29. May maintain an action upon a judgment obtained by the testator, suggesting a *devastavit* in his life-time. Action, judgment, *devastavit*.

Berwick v. Andrews. 314

30. May sue *sci. fa.* to assess damages and for final judgment. *Sci. fa.* judgment by testator.

31. On a judgment obtained by his testator, and against an executor by 8 and 9 *Will. 3. c. 11.* *Ib.* 314, 315

32. Where the debt appears on record, judgment against an executor shall be as if complete in his testator's life-time. Judgment against executor.

Smith v. Harmon. 315

33. If an executor voluntarily pay a statute before a judgment had against testator, it is a *devastavit*; but if after the testator's death execution be taken out and executed, he may plead to it a *sci. fa.* upon the judgment, because he could not hinder execution. *Ib.* Statute, judgment, *devastavit*.

34. Where an infant is executor alone, he cannot sue by attorney; otherwise where he is joined by others of full age. Infant, executor.

Coan v. Bowles. 358

35. If an executor makes a new promise, he loses the benefit of the statute of limitations. New promise by executor.

Heylin v. Hastings. 427

36. The executor said, "prove it and I will pay you," that is as much as to say (said *Holt*) if the goods were sold to the testator, "I promise to pay you for them." *Ib.* Conditional promise.

37. To the husband, his widow or next of kin to the wife; the husband only is entitled to administration. Husband, widow, administration.

Fortre v. Fortre. 42

38. To a *sci. fa.* upon a judgment before his own time, he ought to plead *riens inter mains*. *Sci. fa.* judgment against testator.

Newton v. Richardson. 42

- Holt.*
Durant minori etate. 39. Administration *durante minori etate*, shall determine at seventeen.
Atkinson v. Cornish.
- Aunt, grandmother. 40. Administration to grandmother good against the aunt.
Blackborough v. Davies. 43, 44
- Administrator, trover, his own possession. 41. Where an administrator brings trover upon his own possession, the defendant may give a will in evidence, and an executor upon not guilty; but 'tis otherwise if it be on the possession of the intestate, for there the defendant ought to plead it in abatement; and if he doth not, he shall not give it in evidence.
Blainfield v. March. 44
- Right of a peculiar. 42. What a sufficient averment of the right of a peculiar to grant administration, *debito modo commissio* is sufficient.
Denham v. Stephenson. 46
- Privilege. 43. Privilege not pleadable by him. *lb.*
- Devastavit.* 44. *Devastavit* charged must be traversed.
Bonner v. Underwood. 47
- Liable as assignee. 45. Liable in debt for rent as assignee for the time he enjoys and is in possession of the premises.
Buck v. Barnard. 75
- Funeral expences. 46. No funeral expences are allowed for the pall or other ornaments.
Shelly's Case. 305
- Necessary expences. 47. Necessary expences to be allowed, are only the coffin, bell, parson, clerk, and bearer's fees. *lb.*
- Salkeld.*
 Before probate. 48. He is compleat executor before probate, for all purposes but bringing actions;—he may release a debt, assent to a legacy, intermeddle with goods.
Wankford v. Wankford. 301
- Right before probate. 49. But though by the will he has a right vested, yet he cannot sue for it till probate. *lb.* 299

Salkeld.

50. He may commence an action before probate, but not declare. Commence action.

Wankford v. Wankford. Page 302

51. In trover by an administrator on the intestate's possession, defendant cannot give in evidence a will; on the general issue, he ought to plead it in abatement; *aliter*, on the defendant's own possession. Administrator, will in evidence.

Blainfield v. March. 285

52. The ordinary can't refuse probate to an executor because he is *incapax*. Incapax.

The King v. Raynes. 299

53. Nor can he insist on security from him, because the testator has allowed him sufficient. Security from,

Ib. 299

54. None can prove a will but he who is named executor therein. Will, who can prove.

Wankford v. Wankford. 309

55. As where an executor after administering and before probate dies, his executors can't prove it. Id.

Ib.

56. And where the executor dies, the will not proved, the spiritual court grants an immediate administration, and not *de bonis non*. Id.

Ib.

57. But if an administering executor proves the will, his executor shall be executor to the first testator, and in that case there needs no new probate. Id.

Ib. 309

58. If an executor becomes bankrupt, administration cannot be granted by the special court. *Contra* if *non compos*, because that is a natural disability. Bankrupt; non compos.

Hills v. Mills. 36

59. Where two are executors, and one proves the will and dies, the executorship survives to the other. Two,—one proves will.

House and Downs v. Lord Petre. 311

60. But if the other then renounces, the testator is dead intestate. Id.

Ib.

61. Yet where several are executors, and one only refuses, his refusal is void. One of several refuses.

Wankford v. Wankford. 307

Salkeld.

One of several refuses.

62. And where the refusing executor survives, administration granted during his life is void.

Wankford v. Wankford. Page 307, 308, 311

Executor administers, after refuses.

63. So where an executor administers, and after refuses, administration can't be granted during his life. *Ib.* 308

Obligor, co-executor.

64. An obligor made co-executor refuses, and dies before the others who administered—the debt is extinguished.

Ib.

Executor of executor.

65. The executor of an executor may renounce being executor to the first testator; but if he does not, he is executor of course. *Ib.* 309

Executor proves will, and dies intestate.

66. If an executor proves the will and after dies intestate, his administrator cannot be executor to the first testator.

Ib.

Debtor, executor.

67. But in that case a debtor being executor, and the debt thereby once extinguished, though his administration cannot continue the executorship, that inability will not revive the debt. *Ib.*

Debtor, executor, debt, affects.

68. Yet where a debtor is made executor, the debt is affected. *Ib.* 306

Debt extinguished.

69. For in that case the debt is extinguished not by way of release, but as a legacy. *Ib.* 303

Obligor, executor.

70. An obligor is made executor and administers part, but dies before probate; the debt is extinguished, and the administrator *de bonis non* can have no action for it. (2d. of creditors?) *Ib.* 299, 300

Obligor and another executor.

71. So where several are jointly bound, if the obligee makes one of them his executor, either sole or jointly with a stranger, the debt is released, though the obligor never administers. *Ib.* 300, 301

Obligor, executor, no affects.

72. But where the executor of one of the obligors having no affects, is made executor to the obligee, this is no extinguishment. *Ib.* 305

Executrix of obligee marries obligor.

73. The executrix of the obligee taking the obligor to husband, does not extinguish the debt. *Ib.* 306

74. *Contra,*

Salkeld.

74. *Contra*, if the obligee herself takes the obligor to husband.

Obligee marries obligor.

Wankford v. Wankford. Page 306

75. Because it would be a vain thing for the husband to pay the wife money in her own right, but he may pay money to her as executrix; for if she lays the money so paid to her, by itself, the administrator *de bonis non*, of her testator (if she dies intestate) shall have that money as well as any other goods that were her testator's. *Ib.*

76. In case of a *feme covert* made executor, the husband has a great power; he may administer and bind her, though she refuses, and may release all the debts of the testator; but the wife cannot do any thing to the prejudice of the husband without his consent. *Ib.*

Feme executor, power of bona.

77. If the obligee is made executor to the obligor, and there is not assets, he may sue the heir.

Obligee, executor, no assets. 304

78. An administration granted *durante minoritate executoris*, ceases at the executor's age of seventeen.

Administration *durante minoritate.*

Freke v. Thomas. 39

79. One taking the intestate's goods before administration, the administration is afterwards granted, is an executor *de son tort*; *contra*, if he deliver the goods over to the administrator before the action is brought.

De son tort.

Anonymous. 313

(*V. 5 Co. Read's Case*, 33. *Curtis v. Vernon*, 3 Dr & E. 590.)

80. An executor is chargeable in the *debet* and *detinet*, for rent incurred after his entry.

Debet and detinet.

Buckley v. Pirk. 317

81. But if the rent be more worth than the land, he may plead it.

Rent, value of land. 297, 317

82. Upon a bond debt an action cannot be maintained in the *debet* and *detinet* against the executor, suggesting a *devastavit*; for these surmises to charge an executor in his own right, ought not to be extended further than they have been: *Vent.* 321. 2 *Lev.* 209.

Id.

83. An

*Salkeld.*Rent, value
of land.83. An action cannot be maintained for part, in *detinet*, and for the residue in *debet* and *detinet*. 3 *Lev.* 74.84. When an executor is sued in the *debet* and *detinet*, he cannot plead *plene administravit*. *Sid.* 334. 1 *Mod.* 185.Two join in
acquittal, one
receives the
money.

85. Two executors join in an acquittal, but only one receives the money, both are chargeable to creditors.

Churchill v. Hopton. 318*Id.*86. But the actual receiver only, is chargeable to legatees. *Id.*Mariners
wages.

87. Executor of a master of a ship cannot sue in the admiralty for mariner's wages.

Clay v. Sudgraves. 33Payment of
debts, decree.88. An executor may pay debts of a higher nature, after a decree *quod computet*, but not after a final decree.*Mason v. Williams.* 507Right accrued
in testator's life.

89. He may have an action for a right accrued in the lifetime of the testator.

Williams v. Carey. 12False return,
&c.90. As of false return of a *fieri facias*, or other execution; *contra* of mesne process. *Id.*Attainder of
treason.91. He may bring error and reverse an attainder of treason of his testator. *Per three contra Holt.**King v. Ayloff.* 295Debt for
rent.92. In debt for rent of a term he may plead *no assents*, and that the lands are of less value than the rent, &c.

297, 317

*Id.*93. For he cannot waive for the term only, but must waive the executorship *in toto*, or not at all. *Id.* 29794. (When an executor sues for rent due since the death of testator, he ought to set forth what estate the testator had in the lands at the time of the demise made; otherwise it does not appear but that the heir and not the executor, may be entitled to the rent; and therefore the executor ought to say, that whereas the testator was possessed, &c. but he need not do this for rent incurred in the lifetime of testator, as this belongs to him at all events. *Gilbert on Debt*, 410.)

95. Action

Salkeld.

95. Action by two executors where the probate was only by one, held well, *Brookes v. Stroud.* Page 3 Action by two, probate to one.

96. In debt against him, plea that he is administrator and not executor, is not in bar, but only in abatement. *Harding v. Salkill.* 296 Administrator not executor.

97. In case against him and *plene administravit* pleaded, the plaintiff must prove his debt, or shall recover but one penny damages, though there be assets. *Shelly's Case.* 296 *Plene administravit.*

98. (If defendant pleads *plene administravit* to an action of debt, it admits the debt, for it is for a sum certain; but it is otherwise in *assumpsit*, which is for a sum uncertain, and in the form of damages to be proved. *Saunderson v. Nicholls.* *Show.* 82

99. To a *sci. fa.* on a judgment against the testator, *plene administravit* not shewing how, is ill on special demurrer. *Newton v. Richards.* 296 Id.

100. Pleading of six judgments is a confession of assets above five, and if the replication takes issue upon the *riens ultra* a certain sum, it is ill. *Aston v. Sherman.* 298 Pleading judgments.

101. To debt on bond he pleads six judgments, this confesses assets for above five, and if the replication takes issue upon the *riens ultra* so much, 'tis ill. *Parker v. Atfield.* 312 Id.

102. For his pleading of judgments is a confession of assets to satisfy them, and the *riens ultra*, &c. is not material. *Id.*

103. An executor in pleading judgments with penalties, should shew how much is really due thereon. *Id.* *How much due.* *Id.* 311

104. Where an executor or administrator is charged as assignee, the judgment is *de bonis propriis*. *Tilney v. Norris.* 309 Charged as assignee, *de bonis propriis*.

105. But where one is charged as executor, the judgment shall be *de bonis testatoris*, though he might have been charged *Id.*

charged as assignee; for the plaintiff had his election to charge as assignee or executor.

Buckley v. Pirke. Page 316

Salkeld.

One executor appears, the other makes default.

106. If one executor appears on the *capias* and the other makes default, judgment shall be against both, *de bonis test.*
Rouse v. Etherington. 312

Error, both join.

107. And if error be brought, both must join. *Ib.*

Fi. fa. devastavit.

108. A *devastavit* may be returned by the sheriff on a *fi. fa.* without a *sci. fa.* enquiry.

Rock v. Leighton. 310

Judgment by confession of assets.

109. Judgment against executor by confession or default, is an admission of assets; and he is estopped to say the contrary. *Ib.*

110. On a *devastavit* returned, and so is a jury. *Ib.*

Executor of executor, *devastavit.*

111. A *devastavit* lies for the executor of an executor of him to whom the wrong was done, though not against the executor of him that did the wrong.

Berwick v. Andrews. 314

Seire facias, interlocutory judgment.

112. To a *sci. fa.* upon an interlocutory judgment against an executor, the defendant cannot plead a judgment in bar.

Smith v. Harmon. 315, 42

Costs.

113. In *assumpsit* by executor, for the testator's money received to the plaintiff's use, the executor shall not pay costs on nonsuit.

Eaves v. Mecato. 314

Money to testator's use.

114. Where executors may have *assumpsit* for money to the testator, *vide* action on the case in *assumpsit*. Page 28

Action within six years, plaintiff dies.

115. Where action is brought within six years, and the plaintiff dies before judgment, and after the six years the executor may pursue it.

Matthews v. Philips. 425

Bond in trust, not assets.

116. If *A.* takes a bond for another in trust, and dies, this is not assets in the hands of *A.*'s executors.

Deering v. Torrington. 79

117. So

Balkeld.

117. So if the obligee assigns over a bond, and covenants not to revoke, and dies, this is not assets in the hands of the obligee's executor. Bond assigned, assets.

Deering v. Torrington. Page 79

118. If the executor of lessee for years enter, &c. no part of the profits but what is above the rent is assets. *Ib.* Rent, assets.

119. For the rent is received by the executor as tenant, and as appropriated to the use of the lessor. *Ib.* Id.

120. *Quere*, how far lands are liable to pay debts as assets. Lands liable, assets.

Erlby v. Erlby. 80

121. Outlawry upon mesne process does not make the debt a lien upon the land. Outlawry, *Ib.* mesne process.

122. And bringing debt upon a judgment is no waiver of the lien created by the judgment. Debt on *Ib.* judgment.

123. Where a debtor pays the testator's debt to *A.* with consent of executor, 'tis assets. *Aliter*, if without consent. Payment to third person, consent of executor.

Jenkins v. Plume. 207

124. Unless the executor brings action and recovers, and then 'tis assets even before execution. *Ib.* Id.—assets.

125. Administrator may retain a bond against rent, but he can't plead a bond to another. Bond debt retained against rent.

126. *A.* receives the intestate's money, and afterwards administration is committed to *B.* The cause of action accrues by the administration. Administra-
trix, cause of
action.

Cary v. Stephenson. 421

127. Every ordinary and peculiar may grant administration.

Denham v. Stevenson. 40

128. And every peculiar is an ordinary for this purpose, and see the natures and kinds of peculiars. *Ib.* 41

129. Administration originally belonged to the bishop, and *Henslo's Case* in 9 Co. denied. *Q.*

Manning v. Napp. 37

130. It

Salkeld.

130. It may be granted by the King, for he is supreme ordinary.

Denham v. Stephenson. Page 41

131. Where granted by the lord of a manor, and how to declare thereupon. *Ib.*

132. Declaration upon administration granted *per official. peculiar. &c. debito modo commissa* is good *sans* averment that he had jurisdiction of administrations. *Ib.* 40

133. For where one grants administration *virtute officii*, the plaintiff need not aver his authority. *Aliter*, if by special commission. *Ib.* 41

134. So in *Narr.* by an administrator, want of alledging by whom committed, is cured by pleading *non est factum*, on any plea in chief.

Gidley v. Williams. 37, 38

135. But ill on demurrer, for it might be by a peculiar, and then it must be averred, *eui administrationis commissio de jure pertinuit, &c.* *Ib.* 38

136. To a *Narr.* on administration committed *per Ep. L.* —Plea, that he was resident in another diocese *tempore mortis*, is a good bar.

Hilliard v. Cox. 37

137. Where one has two houses in divers dioceses, it shall be granted by the ordinary where he died. (2. if *bon. notal.*) *Ib.*

138. Where *bon. notal.* are in several dioceses in the same province, the archbishop thereof must grant administration.

Burston v. Ridley. 39

139. But where in one diocese in one province, and in another diocese in another province, each bishop must grant it. *Ib.*

140. Administration granted in *Dorset*, gives no title to administer a judgment had in any court in *Westminster*.

Adams v. Tertenants of Savage. 40

141. Administration is void if granted by a wrong ordinary, but voidable only if granted to a wrong person.

Blackborough v. Davis. 38

142. If

Salkeld.

142. If the intestate dies *sanis* kindred, the property is in the ordinary till administration granted.

Manning v. Napp. Page 37

143. And in that case the ordinary might dispose *in pios usus*, except letters patent procured as usual. *Ib.*

144. Spiritual court may grant administration to which they will, of kindred in equal degree.

Blackborough v. Davis. 38

145. Or part to one and part to another, but of an entire debt it must be to one only.

Fawtry v. Fawtry. 36

146. Administration was granted to the grandmother, and a *mandamus* prayed to the spiritual court by the aunt, but denied.

Blackborough v. Davis. 38

147. Administration of the wife's goods must be granted to the husband only.

Fawtry v. Fawtry. 36

148. But of the husband's goods it may be either to the wife or next of kin, &c. *Ib.*

149. A man marrying a feme executrix, &c. the administration is devolved on him, and he may bring *assumpsit* on a promise to himself without the wife; the promise was in consequence of a new day being granted to debtor of testator.

Yard v. Ellard. 117

150. Administration cannot be granted where there is a will and executor, though the will be concealed or the executor refuse.

Wankford v. Wankford. 301

151. Nor can it be granted though the executor becomes a bankrupt, &c. *Contra*, if he becomes *non compos*.

Hills v. Wills. 36

152. Where it is committed to a debtor, the action is only suspended.

Wankford v. Wankford. 303

153. And

Salkeld.

153. And if to an obligor, though he has a right to receive and is to pay the money himself, it is no extinguishment.

Wankford v. Wankford. Page 306

154. And also since the statute 22 Car. 2. an administrator is bound to account without citation.

Archbishop of Canterbury v. Wills. 315

155. And one intitled to distribution by that statute may sue an administrator to prove his account. *Ib.* 316

156. And a creditor cannot sue the administration bond for non-payment of a debt, for the statute does not extend to it. *Ib.*

157. Administration granted *durante minoritate* of an administrator ceases not till twenty-one, but of an executor it ceases at seventeen.

Preke v. Thomas. 39

158. Administration may be granted during the absence of *B.* but the declaration must aver that *B.* is absent.

Slaughter v. May. 42

159. The cause of action accrues to the administrator from the time of administration granted.

Cary v. Stephenson. 421

160. For if *A.* receives the interest money, and afterwards administration is granted to *B.*, *B.* has six years from the administration granted to bring his action. (*Contra*, if an executor.) *Ib.*

161. Yet if he consents to the defendant's retaining a chattel before, he cannot have trover after administration granted. *Per two, contra Holt.*

Whitehall v. Squire. 295

162. If sued as executor, he may plead he is administrator, and need not traverse that he intermeddled before administration granted.

Powers v. Coot. 298, 317

163. But where sued as administrator, if he pleads he is executor, he must traverse the dying intestate.

Fooler v. Cooke. 297

164. Where

Salkeld.

164. Where an administrator is charged as assignee, the judgment is *de bonis propriis*.

Tilny v. Norris. Page 309

165. But where charged as administrator, though he might have been charged as assignee, it is only *de bonis testatoris*.

Buckley v. Pirk. 316

166. A judgment against him as executor may be pleaded in bar to another action brought against him as administrator.

Harding v. Salkill. 296

167. On a writ of enquiry after an interlocutory judgment revived by *scire facias* on 8, 9 *W.* 3. the final judgment must be against the administrator, and not the intestate.

Weston v. James. 42

168. Administrator under letters patent cannot have case for maliciously hindering him by putting in *caveats*, &c.

Manning v. Napp. 37

169. An administrator impowers *A.* to receive the intestate's debts, but a will appearing, the administration is repealed; the executor may have *assumpsit* against *A.* as for money received to his use.

Jacob v. Allen. 27

1 Lord *Raymond*.

170. *Plene administravit* pleaded to a *scire facias* upon a judgment, ill upon special demurrer, because defendant had not shewn how he had administered. *Scire facias, plene administravit.*

Richards v. Newton. 3, 4

171. Debt by an executor for an escape, must be in the *detinet*. Debt for escape, *detinet*.

Wate v. Briggs. 36

172. The first judgment being in right of the intestate, the action of escape ought to be in right of the intestate also. *Ib.*

173. (Declarations by executors or administrators must be in the *detinet* only. *Frewin v. Penton*, 1 *Lev.* 250.)—
(Otherwise if he sells goods of the testator, and brings debt for

for the money, or takes a bond for a debt due to the testator, or make himself chargeable in any other manner to the estate of the testator. V. 1 Roll. Ab. 602.)

174. (Debt for rent against administrator in his time, brought in the *debet* and *detinet*, where an executor is charged partly in respect of his occupation of the land; the action ought to be in the *debet* and *detinet*. 1 Bulst. 22.—Where it is a mere personal thing which hath his end by the suit there, if of necessity he is to be named executor, the writ ought to be brought against him in the *detinet tantum*; but if it be in realty, the writ shall be brought in the *debet* and *detinet*.)

1 Lord Raymond.

False return,
life of testator.

175. Executor may have case against a sheriff for a false return of a *scire facias* in the life-time of the testator.

Williams v. Gray. Page 40

Judgments
pleaded.

176. An executor pleads judgments; the plaintiff may reply to as many of them as he pleases.

Ashon v. Sherman. 263

Administra-
tor *durante mi-
nori etate*.

177. On judgment against an administrator *durante minori etate*, a *scire facias* lies against the executor, &c. when of age.

Sparks v. Crofts. 265

Id.

178. Plea in abatement that he is administrator *durante minori etate*, must aver that he continues so. 18.

Compellable
to make distri-
bution.

179. Executors not compellable in the ecclesiastical court to make distribution.

Petit v. Smith. 86, 363

Insolvent,
security.

180. An insolvent executor is not compellable to give security in the ecclesiastical court.

King v. Raines. 363

Costs.

181. An executor brings an action for money received to his use, being a debt owing to the testator, and received by the defendant; if he is non-suit, &c. he shall pay costs.

Nicolas v. Killigrew. 437

Id.

182. The rule hath constantly been, that where an executor or administrator can bring the action in his own right, and yet brings it *quatenus* executor, &c. there if he fails, he

he shall pay costs; but if he could not bring the action otherwise than *quatenus* executor, though he fails he shall not pay costs.

Nicolas v. Killigrew. Page 437

1 Lord Raymond.

183. In an action upon an *infirmus computasset* with himself, he is liable to costs. *Costs.*
Ib.

184. Covenant lies against an administrator as assignee, for breach in his own time for not repairing. *Covenant as assignee.*

Tilney v. Norris. 554

185. In an action upon promise by an administrator who has taken out administration in a peculiar, it is a good plea that the defendant was resident in another diocese at the time of the death of the intestate. *Peculiar, residence, diocese.*

Hilliard v. Cox. 562

186. The sheriff may return a *decepsavit* upon a *fieri facias* without a *scire fieri* inquiry; and upon such return, judgment shall be given against the administrator, *de bonis propriis.* *Scire fieri, decepsavit.*

Rock v. Layton. 590

187. Where a man has matter of bar to plead, and he slips his opportunity of pleading it, he loses the benefit of it for ever. *Ib.*

188. A man may give in evidence any thing upon the *scire fieri* enquiry, that he might have given in evidence upon *plene administravit.* *Ib.*

189. Payments of an executor *de son tort*, good. *Executor de son tort.*

Parker v. Kett. 661

190. Executor pleads a judgment, the plaintiff replies fraud; the fraud must be traversed. *Plea of judgment, fraud.*

Parker v. Atfield. 678

191. Pleading of two judgments is an admission of assets above one; the safe and just way for an executor is to plead truly how much is really due upon a judgment. *Ib.*

192. Debt in the *debet* and *detinet* by an executor, for an escape in the time of the testator; ill after verdict. *Escape, debt and detinet.*

Holdin v. Sutton. 698

193. Where

2 Lord Raymond.

Promise to
executor, to
testator.

193. Where a promise is made to the testator, and the statute is pleaded, the plaintiff cannot give evidence a promise made to the executor.

Green v. Crane.

Page 1111

One appears,
others make de-
fault.

194. Where one appears and the rest make default, upon the return of the *capias*, &c. the plaintiff shall have his judgment against all, but for the costs only against him that appears, and all must join in error.

Ross v. Bherington.

870

Devastavit.

195. An executor may have an action against an administrator, against whom his testator recovered judgment for a *devastavit* in the time of the testator.

Berwick v. Andrews.

973

Escape, exe-
cution.

196. An executor may have an action for an escape out of execution in the time of the testator, but he is not chargeable for an escape.

Ib.

Action in his
own right.

197. Where an executor brings an action, that will be in his own right; though he names himself executor, he need not make profert of the letters testamentary.

Wallis v. Lewis.

1215

198. (Now see 4th and 5th Ann. c. 16.)

Ib.

Goods as ex-
ecutor.

199. If a grant of all goods will pass goods which the grantor hath as executor.

Hutchinson v. Savage.

1306

Joint execu-
tor's moiety of
surplus.

200. A joint executor charged with payment of a legacy out of his moiety of the surplus, though he had left the money in the hands of the other executor, from whom the legatee had received interest, as well as a dividend out of his estate, after he became bankrupt.

Spendlove v. Aldrich.

1320

Scire fieri en-
quiry, death of
testator.

201. In a *scire fieri* enquiry and judgment recovered by an executor, there is no need to aver that his testator was dead; nor need it be returned that the jury was sworn, *de et super premissis*.

Morfoot v. Chivers.

1395

Administra-
tor brings tro-
ver, evidence of
executor.

202. Administrator brings trover on the possession of the intestate. The defendant cannot upon the general issue give evidence

evidence that there is an executor; it ought to have been pleaded in abatement.

Maryfield v. Marsh. Page 824

2 Lord Raymond.

204. An executor obtains an award of execution on a *scire facias*; the administrator *de bonis non*, must bring his *scire facias* on the original judgment. *Administrator de bonis non.*

Treviban v. Laurence. 1049

204. Administrator *durante absentia* must aver in his declaration, that the executor is absent in parts beyond the seas. *Administrator durante absentia.*

Slater v. May. 1071

205. Administrator *pendente lite* must aver that the contest continues. *Administrator pendente lite.*

Ib.

206. A wrongful administrator has sold effects; he is answerable to the right administrator after his administration is repealed, in an action, for the money received to his use. *Wrongful administrator sells.*

Lamine v. Derrell. 1216

3 Lord Raymond.

207. Administration granted a stranger, is repealed by a new grant to the next of kin.

Blackborough v. Davies. 685

208. Administration to the next of kin shall be repealed at the suit of the husband, otherwise of the wife. *Ib.*

Ib.

209. Grandmother as near of kin as the aunt. *Ib.*

Ib.

210. A creditor who has had administration, may retain against next of kin. *Ib.*

Ib.

211. Where an executor is made, the spiritual court cannot compel distribution.

Petit v. Smith. 86, 363

212. Freehold *per antea vic*, is not within the statute of distributions.

Olderoun v. Pickering. 96

213. A grandson of a brother is not intitled to distribution, against another brother of the intestate.

Pett v. Pett. 571

Strange.

214. The warrant of one executor is not sufficient to cover judgment against the others. *Warrant of one executor.*

Ewell v. Quash. 20

Executor
take term as
devisee.

Strange.

215. An executor is presumed to take a term as executor, and not as devisee, without proof of his special assent.
Young v. Holmes. Page 70

Erroneous
judgment.

216. An erroneous judgment may be pleaded, and the consideration need not be shown; if fraudulent, it may come out from the other side.

Williams v. Fowler. 407

Devastavit.

217. If a *devastavit* be returned, there needs no allegation of a conversion to their own use.

Bellew v. Scott. 440

Death of testator.

218. In action by executor, the declaration should state that the testator is dead, and he complete executor.

Morfoot v. Chivers. 631

Costs.

219. Where executor must declare as executor, he shall pay no costs.

Portman v. Gamie. 682

Executor of
executor, proof
of will.

220. In action by executor of executor, it must be shown that the first executor proved the will; but the omission is cured by a verdict.

Gradell v. Tyson. 716

Pleas to *scire facias*, to action.

221. Executor cannot plead judgments to the *scire facias*, which he might have pleaded to the action.

Earle v. Hinton. 732

Costs.

222. Where a prosecutor of an information is liable to pay costs for not going on to trial, if the defendant dies his executor shall not have them.

King v. Earl. 874

Penalty of
bond, assets.

223. Where a bond is forfeited in the life-time of the testator, the penalty is the legal debt; and on the issue, what is due must cover so much assets; but on a bond where the day of payment is not come, the assets only can be covered for the sum in the condition.

Bank of England v. Morice. 1028

Puis darrein continuance,
retainer.

224. An administration may be pleaded *puis darrein continuance* to justify a retainer.

Vaughan v. Browne. 1106

225. An

- 225.** An executor shall pay costs on a nonsuit in an action for a duty accruing to himself. Costs, non-suit.
Marsh v. Yellowly. Page 1106
- 226.** If the probate be lost, executor may declare on an exemplification of it. Exemplification of probate.
Shepherd v. Shortbosc. 412
- 227.** Executor may have action against the sheriff, upon 8 Ann, c. 17. for removing a tenant's goods in the life-time of the testator, without paying a year's rent. Sheriff, year's rent.
Palgrave v. Windham. 212
- 228.** Executor cannot add a count in his own right. Count in his own right.
Hookin v. Quiller. 1271
- 229.** Though a *feme* has power to make a will, yet the baron shall have administration. Will by *feme*, baron administrator.
King v. Bettsworth. 897
- 230.** Where the husband has departed from all interest in the wife's fortune, he shall not have administration. Where not.
Ib. 1111
- 231.** Though the wife has a separate estate at her disposal, and makes a will, yet if there be no assent of the husband, he shall have administration. *Feme*, will, baron administrator.
Ib. 1118
- 232.** In *B. R.* calling the defendant administrator in the declaration is sufficient, without a special averment. Averment, defendant administrator.
Holiday v. Fletcher. 781
- 233.** There is a material difference between declarations in *K. B.* and in *C. B.* where the beginning of the declaration is only a recital of the writ.—It is sufficiently alledged here, so as to be traversed; and the word *existante* must be understood. *Ib.*
- 234.** An executor may renounce without giving in an inventory; and a *mandamus* may issue, to oblige the spiritual court to grant administration. Renunciation.
Earl of Suffolk's Case. 9
- 235.** Where an executor was struck with the palsy, so that he could not plead, the court indulged him with time, on terms; but if his disorder is likely to continue, the proper

proper method is, to apply for a commission out of chancery.

Jaffer v. Gough. Page. 47

Hardwick.

Administra-
tor of executor

236. There is not any privity between the administrator of an executor, and the testator, and therefore if such an administrator is sued in the spiritual court for any thing relative to the testator, a prohibition shall go.

Tricker v. Towell. 175

237. The ecclesiastical court has only jurisdiction to compel the immediate representative of the testator to administer. In order to continue the privity, administration *de bonis non*, are granted. 16.

Penalty, day
of payment
past.

238. Where the day of payment is past, the penalty of a bond is the sum due at law; but where the day of payment is not come, the sum is the condition in the debt, and the executor cannot cover the assets any further.

Bank of England v. Martin. 207

239. The modern method of pleading these bonds is, for the defendants in the plea to set out the bonds with the conditions, that the real truth might appear. 16.

240. Executor brought a writ of error, and the judgment affirmed, and held he should not pay the costs.

Sellers v. Wyman. 351

1 Wilton.

Part. right
of a married
woman

241. The husband's right of administration to his wife, is transmissible to his representative, and shall not go to her's.

Ellis v. Collier. 168

Right of her
reduced into
possession.

242. If the husband does not reduce the wife's right into possession, and she survives, and then dies, her representative shall have it. 169.

Judgment by
default.

243. If an executor or administrator confesses judgment, or suffers it to go by default, he thereby admits assets in the amount of the demand; and is estopped to say the contrary in an action on such judgment suggesting a *deceit*.

Sellers v. Hawley. 258

1 *Willm.*

244. *Quere*, Whether *plene administravit* be a good plea in covenant against executors, where the breach is for non-payment of rent incurred in their own time. *Plene administravit*, breach in time of executor.

Lyddall v. Dunlapp. Page 4

245. There is no doubt but defendants might have been charged as assignees of the term. *It.*

246. Where there are two executors and unequal legacies are given them, or a legacy to one and nothing to the other, they shall have the residue undisposed of. *Residue.*

Blackburn v. Feast. 285

3 *Willm.*

247. Where administration is granted by one having a peculiar jurisdiction, the right of committing administration by peculiar ought to be alledged, and is matter of substance and traversable.

Rawlinson v. Stone. 2

(*Argued.*) (Cites 6 Mod. 241.)

248. An executor or administrator, can only be arrested for a debt of testator's or intestate's, on a suggestion of a *devastavit*.

Barker v. Brabam. 368

2 *Blackstone.*

249. An executor may demise in ejectment before probate of a will, lands thereby devised. *Executor demise before probate.*

Bendall v. Summerfet. E. 10 Geo. 3. 694.

250. A marriage covenant with a trustee, for securing a provision for the wife, may be given in evidence by her, on a plea of *plene administravit* to an action brought against her as executrix of her husband; and she may retain out of the personal assets, so much as is equal to the damages she has sustained by the breach of such covenant.

Loane v. Casey. H. 15 Geo. 3. 965

251. The defendant's husband in this case, covenanted with her father as trustee for her, on her marriage, to leave her his personal estate and two hundred pounds *per annum*; the marriage was had, and the testator (the husband) died without issue, having made his will, whereby he subjected his real and personal assets to the payment of his debts, and gave the remainder to his wife, whom he made executrix; but his real and personal assets together, were not equal to the

the value of the two hundred pounds *per annum annuity* from the time of the testator's death.—She administered to her husband.

2 *Blackstone.*

252. *Per Blackstone, J.*—This is the discharge of a debt, and therefore may be given in evidence; it is equivalent to a recovery on an action of covenant, for the executrix cannot sue herself. *Id.*

253. *Per De Grey, Ch. J.*—Wherever an executrix has a right to a sum of money, whether it be strictly a debt to herself, or nominally to another, she may retain it; whatever discharges the executor may be given in evidence without pleading, and this retainer is a discharge of the executor. It has been decided, that a widow executrix may retain the money with which she had paid off a mortgage on her jointure, the husband having covenanted it to be free from incumbrances; this being a satisfaction for his breach of covenant. *Id.*

Plea, *non assumpsit*, specialty in it.

254. Executor having pleaded *non assumpsit*, and a specialty which covered the assets, shall be permitted to withdraw the first plea, on payment of such costs only as were occasioned by that plea.

Deayne v. Grimp. E. 19 Geo. 3. 1275

255. A retainer of a debt may be given in evidence.

Plumer v. Marchant. 1383

Id.

256. This is a debt by specialty, and therefore the administrator has a right to retain against a debt of equal nature. *1384*

Id.

257. Wherever an executor or administrator may be sued, or might have paid, he may retain. *Id.*

Id.

258. An action of covenant is as much a lien upon the assets, as an action of debt. *Id.*

Id.

259. The defendant in this case was co-trustee in his intestate's marriage settlement, under which the intestate covenanted with the defendant and another trustee, that he would by his last will and testament leave, or that his executors or administrators should within six months after his decease, well and truly pay to the defendant and the other trustee seven hundred pounds, or to their executors, &c. the interest to be applied to the maintenance of his wife, for which

which he bound himself, his heirs, executors, and administrators in a penalty to the defendant and the other trustee; he died intestate, the defendant administered to him, and being sued by the plaintiff in debt on a bond for two hundred pounds, it was adjudged, that as the plaintiff's demand and his own were both in the same degree, and as he might as such have paid to the other trustee to the amount of the bond, that therefore he might retain as administrator, although no demand had been made against him either by the wife or her other trustee.

Plumer v. Marchant. Page 1384.

4 Burn.

260. In covenant against an executor, the judgment must be *de bonis testatoris*. Covenant against executor, *de bonis testatoris*.

Elements v. Baldwin. 2155

Cowper.

261. *Assumpsit* lies upon a promise by an executor to pay a legacy in consideration of assets. Promise to pay legacy.

Atkins and Wife v. Hill. 284

262. On a personal demand against an executor in his own right, generally, there can be no judgment *de bonis testatoris*. Judgment *de bonis testatoris*.

Hawkes et Ux. v. Saunders. 289

263. Having assets, is a sufficient consideration for a promise by him to pay a legacy, and it may be recovered in action of *assumpsit*. Assets, consideration, promise. *Ib.* 290

264. Declaration that G. R. by will bequeathed a legacy to the plaintiff, and made the defendant executrix, that she proved the will, and had assets sufficient to pay all debts and legacies, and by reason thereof became liable to pay the legacy, and being so liable promised, &c. is a declaration against the defendant in her own right, and therefore the plaintiff cannot take judgment *de bonis testatoris*. *Ib.*

265. But if assets be proved, (or admitted) and an assent of the executor to the legacy, judgment may be given on such a declaration, *de bonis propriis*; because having assets is a sufficient consideration. Assets, consideration. *Ib.* 293

266. *Quere*, Whether without such assent he could be compelled by an action at law, to pay it. *Ib.* 292 *Id.*

267. An

Action,
which survive
against.

Cowper.

267. An action of trover was brought against an administrator *cum testamento annexo*, the declaration laid the conversion by the testator in his life-time; plea that testator was not guilty.

Hambly v. Frost. Page 374

268. These distinctions were taken as to actions which survive against an executor, or die with the person, on account of the cause of action, and which survive, &c. or die, &c. on account of the form of action, where the cause of action, &c. *Id.*

Tort, or de-
lict.

269. Where the cause of action is money due, or a contract to be performed, gain or acquisition by the labour or property of another, or a promise by the testator expressed or implied, the action survives against the executor, *secus* if it be a tort, or arise *ex delicto* where in form. The declaration must be with force and arms and against the peace, or where the plea to the action must be, as in this case, that the testator was not guilty. *Id.* 375

Douglas.

Debt, action
on judgment.

270. An administrator having recovered a judgment for a debt due to the intestate, needs not declare as administrator in an action on the judgment.

Crawford v. Whittak. 5

271. If he does, it is surplusage. *Id.*

Profert of
letters, admini-
stration.

272. And it is no objection on a special demurrer in such case, that he has not made profert of the letters of administration. *Id.*

Forfeiture to
the King.

273. The effects of an intestate having vested in the King, by a forfeiture of felony; if the ordinary grant letters of administration to *A.* in consequence of a warrant from the King, and they run in the usual form, *viz.* "to pay debts, &c." though with this additional clause, "for the use and benefit of his Majesty," *A.* may be sued by the intestate's creditors, and shall not be permitted to impeach the validity of the letters of administration.

Megit v. Johnson. 524 to 530

274. If a personal representative pleads *plene administravit preter* a certain sum, and afterwards to another action brought in the same term, *plene administravit preter* the same sum, and as to that sum states, that he hath confessed it in the

the other action, this is a good bar; for otherwise an executor would be twice charged.

Waters v. Ogden.

Page 435 to 438

(*V. Salt. 315. Smith v. Harmon.*)

1 *Durnford and East.*

275. Where a payee of a bill of exchange indorses it to *A. and B.* as executors, they may declare as such in an action against the acceptor. Indorsement of bill of exchange.

King and others executors v. Thom.

The same v. Mc. Linnan.

487

276. A plea of judgment recovered on a simple contract pleaded by an administrator to debt on bond, must aver that such recovery was had before notice of the bond debt; otherwise an administrator might defeat a specialty creditor, by confessing as many judgments as he pleased, on simple contract debts. Judgment on simple contract, debt on bond.

Seay v. Mercer.

690

(The only legal notice of debt of superior nature, is bringing an action, 2 *Bk. Com.* 511. or bill filed, or decree in chancery. *V. 1 P. Will.* 401. *Marrice v. Bank of England.*)

277. Where the defendant bound himself as administrator to abide by an award to be made touching matters in dispute between his intestate and another, and the arbitrators awarded that he as administrator should pay, &c. he cannot plead *plene administravit* to debt on the bond; for by submitting to the award, he has admitted assets. Submission to award, assets.

Barry v. Ryfe.

691

278. An executor's right is derived from the will; the probate is only evidence of it: therefore he has a constructive possession from the testator's death. Executor, right from will, probate, evidence.

Smith and another, assignees of Clarke v. Miller.

480

279. If executors carry on trade, they must do it as individuals; unless they carry it on under the direction of the court of chancery. Carries on trade.

Barker v. Parker.

295

280. *Per Lord Mansfield.*—A trade is not transmissible; it is put an end to by the death of the trader. Executors *eo nomine* do not usually carry on trade; if they do they run great risque, unless protected by the court of chancery. Trade, risque.

B.

281. (If

281. (If a man be bound to institute an apprentice in a trade for seven years, and the master dies, the condition is dispensed with.)

282. (For it is personal. But if he were likewise bound to find him with meat, drink, cloaths and lodging, this the executors are obliged to perform: *Sid.* 216. *Lev.* 177.)

2 *Durnford and East.*

De son tort.

283. What acts make a person liable as executor *de son tort*, is a question of law. The jury are to say whether the acts be sufficiently proved.

Padgett v. Priest. Page 97.

Id.

284. The slightest circumstance of intermeddling with the intestate's goods, will constitute a man an executor *de son tort*. *Id.* 597

Id.

285. Therefore if *A.* the servant of *B.* sell the goods of *C.* an intestate, as well after his death as before, though by the orders of *C.* and pay the money arising therefrom into the hands of *B.* *B.* may be sued as an executor *de son tort*. *Id.*

Id.

286. If a person having intermeddled in the intestate's affairs, has money belonging to him in his hands, at the time when an action is brought against him as executor for a debt due from the intestate, he is liable as an executor *de son tort*. *Id.*

Slight circumstance makes.

287. *Per Buller, J.*—The slightest circumstance will make a man executor *de son tort*. It is said in *Dyer*, 166, *b.* that if a man even milk the cows, or take a dog of the defendant, that will constitute him an executor *de son tort*. *Id.*

Id.

288. If a creditor take an absolute bill of sale of the goods of his debtor, but agree to leave them in his possession for a limited time, and in the mean time the debtor die, whereupon the creditor takes and sells the goods, he will be liable to be sued as executor *de son tort* for the debts of the deceased; for the debtor's continuing in possession is inconsistent with the deed, and fraudulent against creditors.

Edwards v. Harben. 587

Id.

289. In this case a person being indebted both to the plaintiff and the defendant, made a bill of sale of all his effects to the defendant, in which was a clause, that the defendant should be at liberty within fourteen days from the execution of the bill of sale, to enter upon and sell the effects

effects so assigned, in case the money was not sooner paid. Before the end of the fourteen days the person died, upon which the defendant entered upon the goods and sold them, when it was held that the owner having been left and dying in possession of the goods; that the assignment was fraudulent, and that the defendant having so interfered, should be liable to the whole of the plaintiff's debt as executor *de son tort*.

Edwards v. Harben. Page 587

2. *Darnford and East.*

290. Per *Buller, J.* An executor sues in a different form from an assignee. The executor can only sue in the *debit*, though his testator might have sued in the *debit* and *credit*; but assignees of a bankrupt are allowed to sue both in the *debit* and *credit*, because the whole property of the bankrupt is vested in them by law.

Winter v. Kretchman. 46

291. An administratrix may maintain an action in her own name against the marshal for the escape of a prisoner who is in execution on a judgment obtained by her as administratrix. Escape of prisoner.

Bonafus v. Walker. 126

292. If money belonging to a testator be received by one after the testator's death, his executor may maintain an action for money had and received in his own right.

Smith v. Barrow. 476

3. *Darnford and East.*

293. If a debtor makes his creditor and another person executors, and the creditor neither proves the will nor acts as executor, he may maintain an action against the other for his demand on the testator. Debtor makes creditor and another executors.

Rawlinson v. Shaw. H. 30 Geo. 3. 557

294. If an executor plead (to an action on bond) payment, and omit to plead *plene administravit*, and a verdict be given against him on such plea, it operates as an admission of assets in an action founded on that judgment, suggesting a *devastavit*. Plea of payment, assets admitted.

Erving v. Peters. Tr. 30 Geo. 3. 685

295. But if he plead *plene administravit*, he is only liable to the amount of the assets in his hands. Plene administravit, assets in hand.

Harrison v. Bessles, cor. Lord Mansfield at Guildhall, 1769. (cited) *Ib.* 688

296. An

De jure test,
delivery to
rightful execu-
tor.

3 Darnford and East.

296. An executor *de jure* test, cannot discharge himself from an action brought by a creditor, by delivering over the effects to the rightful executor, after the action is brought.

Curtis v. Vernon. E. 30 Geo. 3. Page 587

(See *Salk.* 313.)

Cannot re-
tain.

297. Nor can he retain for his own debt of an higher nature, by consent of the rightful executor, given after the bringing of the action by the creditor. *Id.*

Probate of
forged will,
payment.

298. Payment of a debt to an executor who has obtained a probate of a forged will, is a discharge to the debtor of the interest, notwithstanding the probate be afterwards declared null, and administration be granted to the intestate's next of kin. A probate unrevoked cannot be impeached in the temporal courts.

Allen v. Priestman. 125

Tenant for
year, admini-
strator of.

299. In the case of tenancy from year to year, as long as both parties please, if the tenant die intestate, his administrator has the same interest in the land which his intestate had.

Doe & Shore v. Parker. 13

Joining
counts, execu-
tor, testator.

300. A count for money had and received by defendant to the use of the executor as such, may be joined to a count for money had and received to the use of the testator; but a count for a debt due to the executor in his own right, cannot.

Petrie v. Halsey. 659

Count as ex-
ecutor in his
own right.

4 Darnford and East.

301. A plaintiff cannot join in the same declaration a cause of action as executor, with another which accrued in his own right.

Cocherill v. Kynaston. E. 31 Geo. 3. 280

Where de-
clare as execu-
tor.

302. Where the goods of the testator never were in the possession of the executor, he must declare in that character. *Id.*

Id.

303. And whether the conversion happen before or after the testator's death, if the goods when recovered will be assets in the hands of the executor, he may sue for them in that character. *Id.*

304. A

4. *Durnford and East.*

304. A count on a promise made by the defendant as administrator, to pay money received by him as such to the plaintiff's use, cannot be joined with other counts on promises made by the intestate. *Jennings v. Newman. Trin. 31 Geo. 3. p. 347.* Because that count stating a cause of action after intestate's death, would exclude one of the pleas that might be pleaded to the other counts, *plene administravit*, and would warrant a different judgment.

Joining counts on promises by defendant as administrator, &c.

305. Where executors pay a sum of money on the testator's account, which they need not have done, and afterwards bring an action to recover it back again, they must declare in their own right, and not as executors.

Where declare in their own name.

Munt v. Stokes. Hil. 32 Geo. 3. 565

306. Where several are named executors, and one only proves the will and acts, that one is liable to an action, but he cannot sue alone until the others have released. All of them should join.

Several executors, one proves will.

Id.

307. Goods of a testator in the hands of his executor cannot be seized in execution of a judgment against the executor in his own right.

Judgment against executor, goods of testator.

Farr v. Newman. E. 32 Geo. 3. 621

308. If a bond be given to husband and wife administratrix, the husband alone may declare on it as on a bond made to himself.

Bond to *hæres* and *feme*, administratrix.

Ankerstein v. Clarke. E. 32 Geo. 3. 616

1. *Hen. Blackstone.*

309. In an action against an administrator, on promises of the intestate, an *infirmul computassent* with an administrator as such, of money due from the intestate, does not make him personally liable, and may be joined with other counts for goods sold and delivered to the intestate. &c.

Infirmul computassent, administrator as such.

Secar v. Atkinson, Administratrix of Atkinson, Hil. 29 Geo. 3. 102

(*V. Jennings v. Newman. 4 D. & E. 347.*)

310. An executor cannot be charged as such, either for money had and received by him, money lent to him, or on an account stated of money due from him as such; these charges making him personally liable.

Not chargeable, money had and received, &c. money counts.

Rose & Ux. v. Bowler and another, Executors of Bowler. Hil. 29 Geo. 3. 108

311. The

Hen. Blackstone.

311. The general money counts making the defendants personally liable, cannot be joined with others against them as executors.

Rose v. Un. v. Bowler and another, Executors of Bowler. Hil. 29 Geo. 3. Page 108

Chargeable for legacy, how far.

312. *Quere*, Whether an action will lie against executor as such for a legacy left by the testator, in which it would be necessary to aver assets, and he might plead *plene administravit*. *Ib.*

313. But *quere* also, whether an action will lie against an administrator as such; on an express promise to pay a legacy in consideration of assets; in which he may plead *non assumpsit*.

Lewis v. Lewis,ittings at Westminster after Trin. 18 Geo. 3: coram Lord Mansfield. (In note) Ib. 111

Against executors in their own right.

314. In an action against executors in their own right, on a covenant for good title and quiet enjoyment against "any person or persons whatever," contained in an assignment of a lease of the testator by way of mortgage; the declaration must shew a breach by some act of the covenantors.

Noble v. King and another. Trin. 28 Geo. 3. 34

2 H. Blackstone.

Executor *de son tort*.

315. To an action brought by a simple contract creditor against an executor *de son tort*, of an intestate, the executor *de son tort* cannot plead that after action brought, but before plea pleaded, he delivered over the effects to the rightful administrator, though in fact no administration was granted till after the action was brought; nor can he plead a retainer for his own debt of a superior degree, with the assent of the rightful administrator.

Vernon v. Catlis. 18

Costs.

316. Executors are not liable to costs on a judgment, as in case of a non-suit under the statute of 14 Geo. 2. c. 17.

177

Ver. and Scr.

Non assumpsit, admits assets.

317. An administrator's pleading *non assumpsit* singly, is an admission of assets. *230*

318. An

Ver. and Scr.

318. An executor pleads a judgment outstanding, and ^{Judgment} ~~not~~ *assets ultra*; plaintiff replies *assets ultra*; upon this issue ^{outstanding.} the defendant may cover assets to the amount of the judgment, though it be for the penalty of a bond conditioned for the payment of a less sum.

Page 88

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